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*Commissioner Ness sworn in on June 3, 1994.
**Commissioner Chong sworn in on June 6, 1994.

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Federal Communications Commission Record

Volume 9
Issue 17

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... iv

Table of Rulemakings..... v

Table of Localities..... vi

Table by Subject Matter..... vii

Table by Statutory and Rule Provisions..... ix

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 3957

Table of Cases
Volume 9
Issue 17

Case Name	Page
ACI Micro, Inc.	4083
Access Charge Rules To Provide 500 Access Service	4100
AmericaTel Corporation	3993
Ameritech Operating Companies	4024
Anderson, Gary H.	4085
BellSouth	4010
Board of Regents, State of Florida	4049
C-Tec Cable Systems of Michigan, Inc.	4094
C-Tec Cable Systems of Michigan, Inc.	4095
COMSAT Corporation	4021
COMSAT Corporation	4037
Cable TV Act of 1992 - Rate Regulation	4119
Cable TV Act of 1992 - Rate Regulation	4316
Cablevision Industries Corporation	4093
Capital of Texas Public Telecommunications Council	3959
Century Cable of Southern California	4089
Century Cable of Southern California	4090
Comparative Broadcast Hearings	3992
Corporate Satellite Communications, Inc.	4098
Damsky, Heidi	4011
Esaw Industries, Inc.	4084
Fee Decisions of the Managing Director	4105
Financing and Managing 2 GHz Microwave Relocation	4075
Freemon, Elehue Kawika and Lucille K.	4032
GTE Service Corporation	4076
Gignac, A. Lawrence	4040
Liberty Cable Company, Inc.	4035
MCI Communications Corporation	3960
Maritime Radio Station WAP8267	4082
McClure, Mary	4086
McDonald, Michael	4087
Mid-Atlantic Cable Service Company	3991
Mobilcom Pittsburg, Inc.	4101
Mobile Telecommunications Technologies Corp.	4039
NYNEX Telephone Companies	4027
NYNEX Telephone Companies	4079
New York State Department of Social Services	3990
Orion Satellite Corporation	4077
Pacific Bell	4072
Paragon Cable	4091
Pioneer's Preference Rules	4055
Rochester Telephone Corporation	4036
Schedule of Application Fees	4103
Seabreeze Parasail	4081

Case Name	Page
Small Cable Business Association	4009
Suburban Cablevision	4073
TPI Communications International, Inc.	3989
Table of Allotments, FM, Chateaugay, NY	3957
Table of Allotments, FM, Clewiston and Fort Myers Villas, FL	4051
Table of Allotments, FM, Dublin and Marlin, TX	3987
Table of Allotments, FM, Moapa Valley, NV	3983
Table of Allotments, FM, Silverton, CO	4097
Telefonica Larga Distancia de Puerto Rico, Inc.	4041
Time Warner Cable	4029
US West Communications	4022
US West Communications, Inc.	4031
WHYY, Inc.	3977
Waiver of Section 64.704(c) of the Commission's Rules	3985
Walt Disney Company	4007
Warner Cable Communications, Inc.	4088
fONOROLA Corporation	4066

Table of Cases by Delegated Authority and FCC Number

Volume 9
Issue 17

Delegated Authority or FCC Number	Page
DA 94 - 794	3957
DA 94 - 814	3983
DA 94 - 822	4049
DA 94 - 827	3991
DA 94 - 836	3992
DA 94 - 837	3959
DA 94 - 839	4035
DA 94 - 840	4029
DA 94 - 841	4072
DA 94 - 843	4007
DA 94 - 844	3985
DA 94 - 845	4027
DA 94 - 846	4009
DA 94 - 847	3987
DA 94 - 848	3989
DA 94 - 849	3990
DA 94 - 850	4010
DA 94 - 851	4021
DA 94 - 852	4022
DA 94 - 853	4024
DA 94 - 855	4031
DA 94 - 858	4088
DA 94 - 859	4089
DA 94 - 860	4090
DA 94 - 861	4091
DA 94 - 862	4093
DA 94 - 863	4037
DA 94 - 864	4039
DA 94 - 865	4040
DA 94 - 866	4094
DA 94 - 867	4095
DA 94 - 868	4036
DA 94 - 869	4051
DA 94 - 870	4073
DA 94 - 871	4105
DA 94 - 873	4075
DA 94 - 874	4077
DA 94 - 877	4076
DA 94 - 878	4081
DA 94 - 879	4082
DA 94 - 880	4083
DA 94 - 881	4084
DA 94 - 882	4085
DA 94 - 883	4086
DA 94 - 884	4087
DA 94 - 885	4079
DA 94 - 892	4097
DA 94 - 893	4100
DA 94 - 894	4098
FCC 94 - 38	4119
FCC 94 - 40	4316
FCC 94 - 81	4066
FCC 94 - 175	3993
FCC 94 - 188	3960
FCC 94 - 192	4032
FCC 94 - 196	3977
FCC 94 - 197	4041
FCC 94 - 208	4103
FCC 94 - 209	4055
FCC 94 - 214	4101
FCC 94D - 9	4011

Table of Cases by Docket Number
Volume 9
Issue 17

Docket Number			Page
CC	Dkt.No.86	- 2	4010
CC	Dkt.No.94	- 54	4076
CC	Dkt.No.94	- 89	4032
ET	Dkt.No.93	- 266	4055
GC	Dkt.No.92	- 52	3992
GEN	Dkt.No.86	- 285	4103
MM	Dkt.No.89	- 128	3987
MM	Dkt.No.90	- 638	4011
MM	Dkt.No.92	- 262	4316
MM	Dkt.No.92	- 266	4119
MM	Dkt.No.92	- 266	4316
MM	Dkt.No.93	- 76	3957
MM	Dkt.No.93	- 136	4051
MM	Dkt.No.94	- 3	4097
MM	Dkt.No.94	- 91	3983
MM	Dkt.No.94	- 92	4049

Federal Communications Commission Record

Table of Cases by Rulemaking Number
Volume 9
Issue 17

Rulemaking Number	Page
RM - 6655	3987
RM - 6996	3987
RM - 7739	3992
RM - 7740	3992
RM - 7741	3992
RM - 8012	4076
RM - 8161	4051
RM - 8196	3957
RM - 8309	4051
RM - 8310	4051
RM - 8384	4097
RM - 8498	3983

Table of Cases by City
Volume 9
Issue 17

City/ State	Page
Benzonia Township, MI	4094
Brea, CA	4090
Chateaugay, NY	3957
Chignik Lagoon, AK	4085
Clewiston, FL	4051
Colorado Springs, CO	4083
Columbia, SC	4093
Crystal River, FL	4049
Dublin, TX	3987
East Brunswick, NJ	4084
Fort Myers Villas, FL	4051
Homewood, AL	4011
Honolulu, HI	4081
Indiantown, FL	4051
Jupiter, FL	4051
Kalamazoo, MI	4009
Key Colony Beach, FL	4051
Key Largo, FL	4051
Kingston, WA	4086
La Habra, CA	4089
Livingston, NJ	4073
Marathon, FL	4051
Marlin, TX	3987
Moapa Valley, NV	3983
Naples, FL	4051
Nashville, TN	4039
Oakfield Township, MI	4095
Philadelphia, PA	3977
Portland, OR	4091
Silverton, CO	4097
St. Joseph, MI	4040
Wadsworth, OH	4088
Woodinville, WA	4087

Subject	Page
General information	
Common Line element, end user charges include	4100
Adjudication	
Orders or Notices	
Lottery to select licensee	4049
Partnership	4011
Translator	4011
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	3983, 3957, 3987, 4097
Cable Television Service	4007
Waiver by Commission of any provision	4007
Carriers: Service Altered	
Discontinuance/reduction/impairment	
Public coast station, applications to close/reduce service	4039, 4040
Extensions and supplements	
Applications, contents of	4037, 4039, 4040, 4041, 4066, 4098
Commission Organization	
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	4076, 4079
Delegations of authority - Field Operations Bureau	
Commission en banc, matters to be referred	4081, 4082, 4083, 4084, 4085, 4086, 4087
Common Carriers: Miscellaneous Rules	
Allocation of costs to regulated or non-regulated costs	4072
Communications Act of 1934	
Common Carriers	
Complaints to the commission	3990, 4032
Extension of lines, certificate for	4037, 4039, 4040, 4041, 4066, 4098
Procedural and Administrative provisions	
Witnesses and depositions, provisions relating to proceedings	4032
Radio, provisions relating to	
Applications;form of and conditions attached to licenses	3992
Practice and Procedure	
Common carriers: applications under Title II Act	
Licenses, cable landing	4041

Subject	Page
Common carriers: complaints	
Formal or informal	3989
Ex parte presentations, general information	
Purpose: to specify standards of conduct and procedure	4010
Sanction for violation of any provision of this subpart	4010
Fees filed with Commission: schedules: general information	
Filing/grant/license/cable television	4103
Private radio services	4103
Radio broadcast services	4103
Hearing proceedings	
Applicability of hearing procedures	4032
Hearing proceedings: evidence	
Speakerphone, testimony by	4032
Information, general	
Rules, suspension, amendment, waiver	4036
Private Land Mobile Radio Services	
Licensing/use of frequencies in 806-821, 851-866 MHz bands	
Loading requirements for trunked systems	4101
Telecommunications Companies: Classes A and B	
Nonregulated activities	4072

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.291 Delegated Authority	4021
000.291 Delegated Authority	4022
000.291 Delegated Authority	4027
000.291 Delegated Authority	4076
000.291 Delegated Authority	4079
000.310(b)(4) and (d)	3960
000.311 Authority Delegated	4083
000.311 Delegated Authority	4081
000.311 Delegated Authority	4082
000.311 Delegated Authority	4084
000.311 Delegated Authority	4085
000.311 Delegated Authority	4086
000.311 Delegated Authority	4087
001.106 Petitions for Reconsideration	4094
001.108 Rescinding of Order	3977
001.1102-1.1105 Schedule of Application Fees	4103
001.1111 Return or refund of charges	4103
001.1115 Waivers or deferrals	4103
001.201-1.364 Hearing Proceedings	4032
001.402 Pioneer's preference	4055
001.450(d) Requests for Temporary Relief	4073
001.450(d)Request for Stay	4088
001.450(d)Request for Stay	4089
001.450(d)Request for Stay	4090
001.450(d)Request for Stay	4091
001.450(d)Request for Stay	4093
001.711 Formal or informal complaints	3989
001.767 Cable Landing License	4041
001.80 Forfeiture Proceedings	4082
001.80 Forfeiture Proceedings	4083
001.800 Forfeiture Proceeding	4084
001.800 Forfeiture Proceedings	4081
001.800 Forfeiture Proceedings	4085
001.800 Forfeiture Proceedings	4086
001.800 Forfeiture Proceedings	4087
025.117(d) Modification of Station License	4077
032.140 Regulated Accounts	4072
032.230 Nonregulated Activities	4072
063.001 Contents of Application	4098
063.001 Contents of Applications	3993
063.001 Contents of applications	4039
063.001 Contents of applications	4040
063.001 Contents of Applications	4041
063.001 Contents of Applications	4066
063.690 Contents of Application to close or reduce hours at	4039
063.690 Contents of Application to close or reduce hours at	4040
064.704 Call Blocking Prohibited.	3985
064.901 Allocation of Costs	4072
073.202 FM Table of Allotments	3957
073.202 FM Table of Allotments	3987

073.202 FM Table of Allotments 4051
073.202 FM Table of Allotments 4097
073.2080 Equal Employment Opportunity 3977
073.3587 Informal Objectors 3977
076.1000 Definitions 4007
076.1001 Unfair practices generally. 3991
076.1001 Unfair practices generally. 4007
076.1002 Specific unfair practices prohibited 4029
076.1002 Specific unfair practices prohibited 4035
076.1002 Specific unfair practices prohibited. 3991
076.1002 Specific unfair practices prohibited. 4007
076.1003 Adjudicatory proceedings. 4007
076.500 Definitions. 4007
076.610(b) Complaints regarding qualified NCE stations 3959
076.700 Special relief and must-carry complaint procedures. 4007
076.905 Standards for Effective Competition 4095
076.906 Presumption of no effective competition 4094
076.906 Presumption of No Effective Competition 4095
076.910 Franchising authority certification 4094
076.911 Petition for reconsideration of certification 4094
076.911 Petitions for Reconsideration 4095
076.914 Revocation of Certification 4095
076.922 Basic Tier Rates 4073
076.922 Rates for the basic service tier 4088
076.922 Rates for the basic service tier 4089
076.922 Rates for the basic service tier 4090
076.922 Rates for the basic service tier 4091
076.922 Rates for the basic service tier 4093
076.923 Rates for equipment and installation 4088
076.923 Rates for equipment and installation 4089
076.923 Rates for equipment and installation 4090
076.923 Rates for equipment and installation 4091
076.923 Rates for equipment and installation 4093
076.923 Rates for Equipment and Installations Used to Receiv 4073
076.942(a) Refunds 4009
076.944 Commission Review of Franchising Authority Decisions 4093
076.944 Commission Review of Franchising Authority Rate Deci 4073
090.631 Trunked Systems Loading, Construction 4101
300.208 Complaints to the Commission 3990
300.208 Complaints to the Commission 4032
300.214 Extension of Lines 4037
300.214 Extension of Lines 4039
300.214 Extension of Lines 4040
300.214 Extension of Lines 4041
300.214 Extension of Lines 4066
300.214 Extension of Lines 4098
300.24 Extension of Lines 3993
300.309 Action Upon Applications 3977
300.309 Action Upon Applications; Form and Conditions Attach 3992
300.332 Private Land Mobile Services 4101
300.340 Cable Landing License Act 4041
300.409 General Provisions Relating to Proceedings 4032
300.535 Carriage of noncommercial educational television 3959
300.548 Development of Competition and Diversity in Video 3991

300.548 Development of Competition and Diversity in Video 4007
300.548 Development of Competition and Diversity in Video 4029
300.548 Development of Competition and Diversity in Video 4035
300.623 Regulation of Rates 4094
300.800 Charges 4103
47 CFR 001.300 4010
47 CFR 069.400(b) and 69.106 4100
47 CFR § 1.3 4036
500.100 HDO 4049
500.125 - Misrepresentation 4011
500.170 - Financial Qualifications 4011
500.503 Forfeitures in cases of rebates and offfsets 4083
500.503 Forfeitures in cases of rebates and offsets 4081
500.503 Forfeitures in cases of rebates and offsets 4082
500.503 Forfeitures in cases of rebates and offsets 4084
500.503 Forfeitures in cases of rebates and offsets 4085
500.503 Forfeitures in cases of rebates and offsets 4086
500.503 Forfeitures in cases of rebates and offsets 4087
600.623 Regulation of Rates 4095
CFR § 63.50 4031
DA 94-853 MO&O 4024
FOR FCC RECORD ONLY 3977
For FCC Record Only 4095

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-76

In the Matter of

Amendment of Section 73.202(b), RM-8196
Table of Allotments,
FM Broadcast Stations.
(Chateaugay, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 15, 1994; Released: August 8, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Vector Broadcasting, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 2491 (1993), proposing the substitution of Channel 234C2 for Channel 234A at Chateaugay, New York, and the modification of Station WYUL's construction permit to specify operation on the higher class channel. Petitioner filed comments reiterating its intention to apply for Channel 234C2, if allotted. Comments in opposition were filed by L.C.C. Media, Inc. ("LCC"). Reply comments were filed by the petitioner.

2. LCC is the licensee of Malone, New York, Stations WVNV(FM), Channel 243A and WICY(AM). LCC states that Chateaugay is located 15 miles from Malone and that as a C2 facility, Station WYUL would place a city-grade signal over Malone as well as Chateaugay. Thus, it contends that Station WYUL will not only become a competitor of LCC's stations but would also have a "decided advantage in signal quality." It acknowledges that there is no technical bar to the allotment of Channel 234C2 to Chateaugay. However, it argues that upgrading Station WYUL would cause severe economic hardship for the "precariously balanced" Malone and Chateaugay markets. LCC recognizes that it has been the Commission's policy to encourage new allotments wherever technically feasible and without regard to the economic impact on existing stations. However, LCC goes on to state that the Commission has recently recognized the economic problems facing radio broadcasters, citing the ownership rule changes which raised the national radio ownership limit and relaxed the duopoly restrictions. *See Revision of Radio Rules and Policies*, 7 FCC Rcd 2755 (1992), *recon.* 7 FCC Rcd 6387 (1992). LCC agrees that an existing station should not be "hamstrung" from developing the means to compete more effectively since it "already has a large financial investment in its station and is already competing in the local radio environment." However, it states that upgrades by unbuilt stations such as Station WYUL which have not yet begun to compete in the market should be treated as new allotments. LCC states that there are presently ten (10) radio stations which serve Malone, four FM and six AM. In addition, it points out that the Malone area receives service from five television stations, a local cable system, one daily local newspaper, three out-of-town dailies and three weeklies. It believes that the ultimate result of allowing Station WYUL to upgrade its facilities would be to harm the economic viability of all of the area's radio stations and thus affect their ability to provide public service programming. Therefore, LCC requests that petitioner's proposal be denied.[1]

3. In response, petitioner states that the single subject of this proceeding is the "routine, and uncomplicated, channel substitution at Chateaugay and upgrade of Station WYUL." The allotment comports with the Commission's technical requirements and does not conflict with any other proposed or actual usage of the channel. Petitioner points out that this fact was addressed by LCC in a brief sentence in the summary of its comments wherein it agrees that the upgrade is technically feasible. The remainder of the opposition, according to petitioner, consists of references to the current "troubled" state of the industry in an attempt to protect its station from economic competition. Petitioner notes that in 1988 the Commission eliminated issues relating to the potential effects of economic competition from any licensing proceeding. *See Policies Regarding Detrimental Effects of Proposed New Broadcast Station on Existing Stations*, 3 FCC Rcd 638 (1988), *recon. den.*, 4 FCC Rcd 2276 (1989). Further, it states that if the proposed upgrade of Station WYUL is denied, LCC's AM and FM stations will have a virtual monopoly on local radio service. Petitioner asserts that the stations which LCC claims serve Malone are licensed to communities far removed from Malone. It states that Messena, New York, is more than 30 miles from Malone, Plattsburgh, New York, more than 40 miles from Malone and Burlington, Vermont, more than 60 miles distant.

4. After reviewing the record before us, we believe that petitioner's proposal should be granted. Contrary to LCC's assertion that Chateaugay currently receives or will receive service from ten aural services, a staff engineering study shows that the residents of Chateaugay receive six services, which are: 70 dBu ("city-grade") service from FM Stations WYUL, Channel 234A, Chateaugay, and WGFB, Channel 260C, Plattsburgh, New York, 60 dBu service from Station WVNV, Channel 243A, Malone, 0.5 mV/m service from AM Stations WICY, 1490 kHz, Malone, WEAV, 960 kHz, and WNWX, 1070 kHz, Plattsburgh, New York. Malone receives five services, which are: 70 dBu ("city-grade") service from noncommercial educational Station WSLO, Channel 215A, and Station WVNV, 60 dBu service from Station WGFB, Plattsburgh, and Station WYUL, Chateaugay, as well as 2.0 mV/m service from LCC's co-owned AM Station WICY. Further, based on the staff's engineering review, we find that a large part of the gain area, particularly to the west of Chateaugay, currently receives only one to four aural services.

5. We believe that the allotment of Channel 234C2 to Chateaugay will serve the public interest since it furthers the Commission's allotment priorities by providing service

[1] LCC also raises issues of integration of ownership and commitment to serve the community. Petitioner filed responsive comments in opposition. These issues are not properly raised in an allotment proceeding and will not be addressed further in this proceeding.

to underserved areas. Furthermore, even if we were to depart from our policies of not considering the potential detrimental effects of facilities modifications on the service rendered to the public, the evidence submitted, consisting of little more than bare allegations, is insufficient to demonstrate any such effect. We also believe granting the requested upgrade is consistent with the Commission's intent in adopting revised multiple ownership rules. In revising those rules, the Commission recognized the benefits to competition and diversity that economies of scale may provide. *See Revision of Radio Rules and Policies*, 7 FCC Rcd 6387 at 6388 (1992). Although the Commission focused on economies of scale deriving from station consolidation, we note that station upgrades, through coverage by the same station of larger areas and populations, also provide economies of scale that may substantially enhance competition and diversity in markets.

6. Accordingly, we believe that the public interest would be served by substituting Channel 234C2 for Channel 234A at Chateaugay, New York, since it could provide the community with a wide coverage area FM service and enable Station WYUL to expand its service area. As proposed, we will also modify Station WYUL's construction permit to specify operation on the higher class channel.

7. Channel 234C2 can be allotted to Chateaugay in compliance with the Commission's minimum distance separation requirements, with respect to domestic allotments, at the transmitter site specified in Station WYUL's construction permit, which is 13.5 kilometers (8.4 miles) southeast.[2] The allotment is short-spaced to Stations CIMF-FM, Channel 235C1, Hull, Quebec, CHWY, Channel 236B, Montreal, Quebec, and unoccupied Channel 234C1, Trois Rivieres, Quebec. Concurrence in the allotment by the Canadian government, as a specially negotiated allotment, has been received since Chateaugay is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 19, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Chateaugay, New York	234C2

9. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Vector Broadcasting, Inc., for Station WYUL, Chateaugay, New York, IS MODIFIED to specify operation on Channel 234C2, in lieu of Channel 234A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

10. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Vector Broadcasting, Inc., permittee of Station WYUL, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[2] The coordinates for Channel 234C2 at Chateaugay are North Latitude 44-49-41 and West Longitude 73-58-43.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Capital of Texas Public Telecommunications Council against TCI Cablevision of Texas, Inc.	CSR-4139-M; TX0211, TX1257, TX0282, TX1587, TX1272

Petitions for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: July 28, 1994; Released: August 8, 1994

By the Chief, Cable Services Bureau:

1. On June 22, 1994, a petition for reconsideration was filed on behalf of TCI Cablevision of Texas, Inc. ("TCI"), operator of cable systems serving various areas in Texas, including Seguin and New Braunfels, Texas. TCI requests that the Commission reconsider its June 7, 1994 Order requiring TCI to commence carriage of non-commercial educational television station, KLRU-TV, Austin, Texas on its Seguin and New Braunfels systems, unless it submitted engineering data to prove its claim of poor signal quality against KLRU-TV. No opposition to this petition has been received.

2. In support of its request, TCI submits data for the Seguin system consisting of five signal level readings taken over the course of a two-hour period and for the New Braunfels system consisting of six signal level readings taken over the course of a two-hour period. These tests were conducted by TCI's Assistant Area Engineer, Keith Sterner, on June 21 and 22, 1994 . Both sets of data demonstrate, consistent with Commission requirements, that KLRU-TV's signal strength for both systems is substantially below the level of -45 dBm required for UHF stations.

3. Staff review of the undisputed engineering data submitted by TCI confirms its contention that KLRU-TV's signal quality at the system's designated headends is not sufficient to entitle the station to mandatory carriage on TCI's cable systems serving Seguin and New Braunfels, Texas. *See* 47 U.S.C. § 535(g)(4). Accordingly, the petition for reconsideration filed June 22, 1994 on behalf of TCI Cablevision of Texas, Inc. IS GRANTED, and our Order adopted on May 18, 1994[1] IS RESCINDED, pursuant to authority delegated in §§ 0.321 and 1.106 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] *Capital of Texas Public Telecommunications Council against TCI Cablevision of Texas, Inc.*, DA 94-518 (released June 7, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

MCI Communications Corporation
British Telecommunications plc

File No. I-S-P-93-013

Joint Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, as amended

DECLARATORY RULING AND ORDER

Adopted: July 14, 1994; **Released: July 25, 1994**

By the Commission: Commissioners Quello and Barrett issuing separate statements.

Table of Contents

	Paragraph Nos.
I. Introduction	1
II. Background	2 - 5
III. Comments	6 - 9
IV. Discussion	10 - 56
A. Section 310(d) Transfer of Control.	10 - 18
B. Section 310(b)(4) Alien Ownership Benchmark	19 - 23
C. Applicability of Comparable Market Access Standard	24 - 28
D. Other Competitive Concerns	29 - 31
a. Leveraging of Market Power	32 - 46
b. Territorial Allocation	47 - 54
c. Procompetitive Effects.	55 - 56
V. Conclusion	57 - 58
VI. Ordering Clauses	59 - 74

I. INTRODUCTION

1. On August 23, 1993, MCI Communications Corporation (MCI) and British Telecommunications plc (BT) filed a petition for declaratory ruling on two issues. First, MCI and BT seek a Commission ruling that the terms and conditions of BT's investment in MCI do not result in a transfer of control of MCI to BT, and, accordingly, prior Commission approval is not required pursuant to Section 310(d) of the Act.[1] Second, they seek a Commission ruling that BT's proposed 20 percent ownership interest, even when aggregated with existing non-BT foreign investment for a total of up to 28% foreign investment, is consistent with and permissible under Section 310(b)(4) of the Communications Act (the Act). We grant this petition for the reasons stated below. We also impose certain reporting requirements on MCI and order its compliance with certain commitments it has made to the Commission.

II. BACKGROUND

2. MCI is a publicly-traded U.S. corporation that owns or controls subsidiaries that hold domestic common carrier microwave licenses, international facility authorizations, cable landing licenses, and other FCC licenses and authorizations. MCI conducts its business primarily through its subsidiaries. MCI is the second largest U.S. carrier of long-distance telecommunications services, providing a broad spectrum of domestic and international voice and data communications services. Its domestic telecommunications services are provided primarily via fiber and terrestrial digital microwave communications systems. Its international telecommunications services are provided primarily via submarine cable systems, satellites and leased international facilities.

3. BT is the largest telecommunications operator in the United Kingdom, providing local, long distance and international telephone service, and telecommunications equipment for customers' premises.[2] BT also offers a range of other telecommunications products and services, including private line circuits, mobile communications products and paging services. At present, BT is a public limited company, with a minor shareholding by the U.K. government.[3]

4. On June 2, 1993, BT and MCI announced their global alliance which entails (i) BT's acquisition of 20 percent of MCI, (ii) MCI's acquisition of BT's telecommunications businesses in the Americas and BT's acquisition of MCI's telecommunications businesses outside of the Americas, and (iii) creation of "NEWCO", a joint venture to develop enhanced telecommunications services for multinationals on a global basis. The petitioners seek a declaratory ruling limited to the contents of the Investment Agreement,[4] and not with respect to any other agreements, such as the NEWCO joint venture agreement. Pursuant to the latter agreement, MCI will serve as exclusive distributor of

[1] Petitioners also seek a ruling that there is no transfer of control for purposes of Section 214 of the Act, 47 U.S.C. §214 and the Cable Landing License Act, 47 U.S.C. §§34-39.

[2] BT has about 97 percent of the local terminations and the most fully developed long distance network in the United Kingdom. *See Consultative Document on Interconnection and Accounting Separation*, issued by the Director General of Telecommunications, Office of Telecommunications, United Kingdom, June 1993 at 2. In addition, BT is clearly the principal service provider in the international facilities-based services market in the United Kingdom, which has a duopoly for the provision of such international services.

[3] The U.K. government holds no more than 1.5% of BT's issued share capital. The government also has the right to appoint or nominate not more than two non-executive directors.

[4] On June 29, 1994, BT and MCI submitted an updated version of the Investment Agreement to reflect clarifications of existing provisions of the Investment Agreement.

NEWCO's products in the Americas and the Caribbean, while BT will serve as exclusive distributor for them in the rest of the world.[5]

5. On June 15, 1994, the Department of Justice (Justice) filed a civil antitrust complaint under Section 15 of the Clayton Act, alleging that BT's proposed 20 percent investment in MCI and the joint formation of NEWCO would violate Section 7 of the Clayton Act.[6] Justice and the defendants (MCI and NEWCO) have stipulated to the entry of a Final Judgment which Justice believes provides an adequate remedy to the competitive concerns. We note that the substantive requirements of the Final Judgment and the accompanying explanatory text of the Competitive Impact Statement (CIS) indicate that Justice shares our traditional policy concerns about the potential for discrimination and leveraging of foreign market power by dominant foreign carriers.[7] Indeed, much of the Final Judgment's underlying rationale, as set forth in the CIS, echoes this Commission's existing policy goals, current competitive safeguards, and new safeguards being imposed in this order.

III. COMMENTS

6. We placed the petition for declaratory ruling on public notice. American Telephone and Telegraph ("AT&T"), Sprint International ("Sprint"), ACC Global Corp. ("ACC"), and Kenneth W. Robinson (Robinson) filed comments, to which BT and MCI jointly replied, as well as Cable & Wireless, Inc. (CWI).

7. Generally, the commenters maintain that the proposed transaction raises concerns about potential discrimination (*e.g.*, leveraging of foreign market power), asymmetric market access in the United Kingdom, and potential exclusive dealing in enhanced and basic services through NEWCO. No party argues that the terms and conditions of the Investment Agreement (Agreement) result in a transfer of control of MCI to BT under §310(d) of the Communications Act.

8. AT&T does not object to the petitioners' request to permit MCI to exceed §310(b)(4)'s alien ownership benchmark. Both ACC and Sprint, however, maintain that the transaction is not in the public interest under §310(b)(4) absent conditions to achieve comparable market access and to prevent discrimination.[8] AT&T and Sprint urge the Commission either to consider this petition in a future proceeding triggered by AT&T's petition for rulemaking on regulation of market entry or to broaden the scope of the Commission's review of this petition to encompass their concerns about leveraging foreign market power and comparable market access.[9]

9. Finally, Robinson asserts that the proposed transaction is in the public interest, but that the Commission should impose three conditions on the overall transaction. Specifically, Robinson urges the Commission to condition a favorable declaratory ruling on (i) BT's adopting a policy under which U.S.-based carriers are charged no more for access to BT's U.K. facilities than MCI pays for access to U.S. telephone carriers' facilities, (ii) MCI's committing to pass through to U.S. consumers all local exchange carrier access charge reductions, including those made by BT under the first condition, and (iii) BT's and MCI's committing to accord equitable, nondiscriminatory access to their telecommunications facilities.[10] These proposed conditions raise broad policy implications beyond the scope of this proceeding. We conclude that they are more appropriately considered in a proceeding of general applicability, and, therefore, deny Robinson's request.

IV. DISCUSSION

A. Section 310(d) Transfer of Control

10. We first address the issue of whether the terms and conditions of the Agreement result in a transfer of control of MCI to BT for purposes of Section 310(d) of the Act. On June 2, 1993, MCI and BT entered into the Agreement pursuant to which BT will acquire 20 percent of MCI's equity and voting power. Under this Agreement, BT will purchase a total of 134,225,082 newly issued shares[11] of MCI Class A common stock for a total value of $4.3 billion, after which BT will own approximately 20 percent of the resulting total of 671.1 million outstanding shares of MCI capital stock.[12]

11. The issue of whether a particular entity holding a minority stock interest of record in a corporation actually controls that corporation depends primarily on whether the minority shareholder has the power to "dominate" the management of corporate affairs.[13] This standard acknowledges that influence and control are not identical.[14] A minority shareholder does not necessarily control a cor-

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[5] On June 15, 1994, BT and MCI announced that the NEWCO joint venture is now called "Concert".

[6] *U.S. v. MCI Communications Corp. and BT Forty-Eight Co.(NEWCO)*, Case No. 1:94 CV01317 (D.D.C. filed June 15, 1994). For further discussion of the Final Judgment, *see* notes 7, 74, 84, 95, and 98, *infra*.

[7] We note that one of the prerequisites to BT's being able to lease circuits from MCI or NEWCO for the provision of any international simple resale services, as defined in the Final Judgment, is that all qualified U.S. carriers' pending licenses in the United Kingdom be granted. *See* Final Judgment at II.E. On July 11, 1994, the U.K. government announced its intent to grant AT&T's pending license.

[8] For further discussion, *see* ¶ ¶ 24-46, *infra*. k

[9] On September 22, 1993, AT&T filed, simultaneously with its comments in this proceeding, a petition for rulemaking on market entry and regulation of international common carriers with foreign carrier affiliations, RM-8355 (*see* Public Notice of October 1, 1993).

[10] We note that pursuant to Section 202 of the Communications Act MCI is prohibited from engaging in unjust or unreasonable discrimination with respect to, *inter alia*, facilities. We further note that Condition 17 of BT's U.K. operating license subjects BT to certain nondiscrimination obligations.

[11] This total may increase if, under certain circumstances, MCI issues additional common stock prior to the closing.

[12] MCI is issuing Class A shares to BT that contain certain consent rights. The Class A shares are equivalent on a per share basis to MCI's existing common stock except with respect to certain voting rights. So long as Class A shares remain outstanding, BT will be entitled to elect a number of Class A directors proportionate to its percentage of ownership of MCI, but in no way to exceed the percentage permitted under Section 310. BT is also entitled to proportionate representation on committees of the MCI Board (other than the Nominating Committee), subject to any requirements of law or NASDAQ National Market System. *See* Agreement at 55-56.

[13] *Benjamin L. Dubb*, 16 F.C.C. 274, 289, 6 R.R. 1325, 1339 (1951).

[14] *McCaw Cellular Communications, Inc.*, 4 FCC Rcd 3784 (Com. Car. Bur. 1989).

poration unless it exercises influence to a degree that "determines" the company's policies and operations, or "dominates" the company's corporate affairs. Thus, the facts of a particular situation (*e.g.*, who has the power to direct the company's operations, who determines the make-up of the Board of Directors), are relevant to determining who controls the company.[15] With these general guidelines in mind, we turn now to the specific factors presented in the petition regarding the parties' representations as to their future conduct.

12. MCI is presently controlled by its public shareholders through a twelve member Board of Directors. The Agreement requires MCI to expand its Board of Directors from twelve to fifteen members. As a result of its equity contribution, BT would be able to designate up to three of the fifteen MCI Board members. The remaining twelve directors must be U.S. citizens. Of these, four may be executive officers of MCI and eight must be individuals who satisfy certain specified criteria as Independent Directors.[16] A Nominating Committee, chaired by MCI's Chief Executive Officer (CEO) and composed of a minimum of four Independent Directors, will determine whether prospective nominees are independent.[17] As MCI's public shareholders will maintain the majority voting interest in MCI and will elect 80 percent of the Board of Directors (including MCI and Independent Directors), BT's directors will remain a minority. Moreover, MCI will continue to conduct business by a simple majority vote on all matters considered by the Board.[18] Thus, we find that BT's mere acquisition of the 20% minority interest, and the accompanying proportionate representation on the Board of Directors, does not itself constitute a transfer of control.

13. We must nonetheless review the particular terms set out in the Agreement to determine whether there is some additional factor that would give BT the power to control MCI. Specifically, we must consider the voting and consent rights in the Agreement, which are intended to protect BT's investment in MCI.[19] In addition to its voting rights,[20] BT's Class A stock incorporates certain consent rights. Specifically, BT has the right to withhold its required approval of the following actions by MCI: (i) certain business combinations during the first four years after consummation of the transaction; (ii) any amendment to MCI's charter that would adversely affect BT's rights as a Class A stockholder;[21] (iii) issuance of supervoting stock of MCI; (iv) adoption or amendment by MCI of any stockholders' rights plan that would adversely affect BT in relation to itsposition at closing;[22] (v) issuance of voting securities of MCI exceeding 10 percent of MCI's outstanding voting securities in any single or related series of transactions or 15 percent of MCI's outstanding voting securities of MCI over a rolling three- year period;[23] (vi) entry into non-telecommunications business where the costs exceed 5 percent of MCI's market capitalization or into telecommunications business where the costs exceed 20 percent of MCI's market capitalization; (vii) dispositions or encumbrances of assets with a fair market value exceeding 15 percent of the total fair market value of MCI's assets; (viii) borrowing by MCI that could cause MCI's debt/total capitalization ratio to exceed 65 percent; and (ix) extraordinary cash dividends or distributions exceeding 5 percent of MCI's market capitalization. These consent rights pertain to extraordinary corporate action of MCI that could disadvantage BT as a Class A shareholder, dilute BT's economic interest in MCI, or change the business or capital structure of MCI.[24] Thus, a question arises as to whether these restrictions simply constitute a minority shareholder's protections or rise to the level of a transfer of control of MCI to BT.

14. The Commission has previously held that covenants that give a party the power to block certain major transactions of a company do not in and of themselves represent the type of transfer of corporate control envisioned by Section 310(d).[25] Indeed, the Commission has specifically found that certain restrictions which limit the otherwise normal financial prerogatives of the Board of Directors,[26] such as many of the provisions which require BT's consent prior to MCI's undertaking various significant corporate actions, need not represent a transfer of control. Moreover, while BT may block certain major transactions, it cannot compel MCI to engage in any major transactions. As BT and MCI assert,[27] BT's power appears designed primarily to protect its own investment in MCI. We accordingly find, in light of BT's expressed intent not to control MCI and, in the absence of any provisions in the Agreement to the contrary, that BT's consent rights regarding such matters as issuance of new equity, the sale of assets, certain business combinations, and entry into certain telecommunications and non-telecommunications businesses do not constitute a transfer of control.[28]

15. The Commission has also found that a minority shareholder's right to prevent any change in a company's by-laws or charter does not constitute a transfer of control.[29] Likewise, we have previously found that requir-

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[15] *Id.* at 3789, (citing *Metromedia,Inc.*, 98 FCC 2d 299, 306 (1984)).

[16] The specific criteria for "Independent Director" are derived from the New York Stock Exchange rules. *See* Petition at 8-9. In addition, the Agreement provides that the eight incumbent directors, who are not executive officers of MCI, are to be considered Independent Directors for purposes of this Agreement. *See* Agreement, §9.7(b)(i). Therefore, aside from the addition of the BT-designated directors, the agreement does not change the composition of the incumbent MCI board.

[17] Although BT will have the right to advise the committee as to whether it believes the nominees satisfy the independence criteria, BT will not participate on the Nominating Committee or have any veto power over nominations.

[18] *See* Petition at 10.

[19] *See* Petition at 7-14.

[20] *See supra*, ¶12.

[21] MCI has agreed not to amend its by-laws in any way adverse to BT's rights so long as BT's percentage ownership of MCI's voting securities exceeds specified thresholds. *See* Agreement, §9.10(b).

[22] *See* Agreement, §§9.4, 9.5, and 11.8.

[23] As long as BT's ownership of MCI remains at least at 10 percent, MCI's ability to issue stock to non-U.S. persons will be significantly restricted. *See* Agreement, §9.8(a). This provision appears to be a mechanism for ensuring MCI's compliance with Section 310(b)(4) of the Act.

[24] *See* Petition at 13.

[25] *See McCaw* at 3789, (citing *News International, plc*, 97 FCC 2d 349, 356 (1984)).

[26] *News International, plc.*, at 356 (citing *Data Transmission*, 44 FCC 2d 935 and *Flathead Valley Broadcasters*, 5 RR 2d 74 (Rev. Bd. 1965)).

[27] *See* Petition at 13-14.

[28] *See McCaw* at 3789, (citing *Data Transmission*, 44 FCC 2d 935, 936-37).

[29] *News International, plc.* at 357-58.

ing the minority shareholder's consent before the corporation can amend its by-laws or articles of incorporation is designed generally to safeguard the minority shareholder's investment by preventing the dilution of its stock holdings.[30] There is no apparent reason to conclude that the present charter or by-laws set policy for the day-to-day operations or necessary expenditures of MCI. Nor is there any apparent reason to conclude that BT will be able to set MCI's policies as to finances, personnel policy and actions, or its other regular business activities, which are important factors in determining where control rests.[31]

16. Under the Agreement, BT's consent is required for any amendments to the shareholders' rights plan that could adversely affect the rights of Class A shareholders. Previously, the Commission has found that such shareholders' rights plans are commonplace, and do not raise concerns for Section 310 analysis, particularly where the majority of the directors are independent.[32]

17. In addition, the Agreement contains certain safeguards designed to ensure that control of MCI remains with the public shareholders, including provisions prohibiting BT from soliciting proxies, becoming part of a voting group, establishing a voting trust, or voting on Independent Directors. It also obliges BT to cumulate all of its votes for election of its designees for the Board if its Class A shares are ever converted to MCI common stock. Moreover, with a few exceptions, BT is obligated to vote its MCI shares in the same proportion as other shareholders with respect to any matter.[33] In addition to all of the above, BT represents to the Commission that it disavows any intent to control MCI within the meaning of Section 310.

18. We have fully considered all of the particular factors relating to the issue of a transfer of control, both individually and cumulatively, including the representations made by the parties. Moreover, we believe it is not reasonable to infer, in the absence of evidence to the contrary, that BT will not abide by its representations that it will not exercise control over MCI. Thus, we conclude that the Agreement between MCI and BT does not grant BT the right to determine the policy that MCI will pursue, or indicate that BT will dominate the management of MCI's corporate affairs. Consequently, we find that this transaction before us does not constitute a transfer of control and, therefore, does not require Commission approval under §310(d) prior to consummation of the transaction.[34]

B. Section 310(b)(4) Alien Ownership Benchmark

19. We next address the issue of the foreign ownership of Title III radio licensees raised by the proposed transaction. The presence of aggregated alien ownership in excess of 25 percent in MCI, the parent corporation of Title III common carrier radio licensees, triggers the applicability of Section 310(b)(4)'s statutory benchmark, which requires that we determine whether the "public interest will be served by the ... revocation of such license."[35] Pursuant to the Agreement, BT will acquire 20 percent voting and equity interest in MCI, a U.S. corporation organized under the laws of Delaware. Based upon an MCI ownership survey, BT and MCI maintain that BT's proposed acquisition of 20 percent of MCI will result in 24.98 percent alien ownership of MCI's capital stock (plus or minus 1.32 percent at the 97.5 percent confidence level).[36] Due to likely fluctuations in alien ownership from the publicly-traded nature of the company, BT and MCI believe the alien ownership may exceed the statutory benchmark at any one time by up to 3 percent.[37] Therefore, BT and MCI have requested the Commission to find that up to 28 percent alien ownership in MCI is both consistent with and in the public interest.

20. Upon consummation of the transaction, MCI could at any time have up to 28 percent alien ownership (20 percent BT and approximately 5 percent non-BT, with a 3 percent margin for fluctuation), with 80 percent U.S. directors and 100 percent U.S. officers. Both prior to and after consummation of the transaction, however, 100 percent of the officers and directors of MCI's wholly-owned Title III common carrier licensee subsidiaries will be U.S. citizens.[38] MCI maintains that the aggregated 28 percent alien ownership is consistent with the public interest and falls within Commission precedent permitting alien ownership in excess of the statutory benchmark.

21. Section 310(b)(4) provides the Commission with the discretion to disallow alien ownership or participation along a vertical ownership chain that exceeds the 25 percent statutory benchmark. Thus, upon a public interest analysis, the Commission decides whether to authorize

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30 *See McCaw* at 3789.

31 *See News International, plc.* at 357-58.

32 *WWOR-TV, Inc.*, 6 FCC Rcd 193, 204 (1990).

33 *See* Agreement §10.3(b).

34 Therefore, prior Commission approval pursuant to Section 214 of the Act, 47 U.S.C. §214, and the Cable Landing License Act, 47 U.S.C. §§34-39, is also not required.

35 Section 310(b)(4) states, in pertinent part:

> (b) No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by --
>
> * * *
>
> (4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, *if the Commission finds that the public interest will be served by the refusal or revocation of such license*.

47 U.S.C. §310(b)(4) (emphasis added).

36 Petition for Declaratory Ruling, Exhibit A at 2, Declaration of John Worthington. Upon consummation of the transaction, BT would be the largest single shareholder in MCI.

37 To ensure that the alien ownership level in MCI does not exceed 28%, MCI will be required to conduct surveys of the public shareholders on a periodic basis.

38 *See* Petition at 16.

alien ownership or participation in excess of the Section 310(b)(4) statutory benchmark on a case-by case basis.[39] In those instances where the Commission has authorized alien ownership or participation beyond the statutory benchmark, the Commission has considered the level of alien presence in light of the extent of U.S. presence in other areas (ownership, officers, or directors) relevant to a public interest determination under Section 310(b)(4).[40] In *GRC Cablevision, Inc.*, for example, where the Commission allowed 60 percent alien ownership of a licensee's parent, it specifically noted that the majority of the parent's Board of Directors was comprised of U.S. citizens and the parent itself was a U.S. corporation. Furthermore, the Common Carrier Bureau (Bureau) noted in *Millicom*,[41] where it approved greater than 25 percent alien presence on the Board of Directors, that 90 percent of the shareholders and a majority of the Board were U.S. citizens. More recently, the Bureau approved 65 percent alien ownership in a licensee's parent where there was a 75 percent U.S. presence in the corporate roles of officers and directors.[42]

22. The petition before us may not raise the traditional concerns present in a Section 310(b)(4) analysis as it is only the potential 3 percent fluctuation in alien ownership beyond the 25 percent statutory benchmark due to the widely-held nature of the stock that causes the petitioners to seek a favorable Section 310(b)(4) declaratory ruling. We note, nonetheless, that this transaction involves a dominant U.S. presence among MCI's officers, directors and shareholders. Specifically, the possible 3 percent fluctuation in non-BT alien ownership beyond the statutory benchmark must be viewed in light of the presence of 80 percent U.S. directors and 100 percent U.S. officers in MCI, in addition to the 100 percent U.S. officers and directors in MCI's Title III licensee subsidiaries.

23. Approval of the percentage of proposed alien ownership in MCI resulting from the transaction with BT is consistent with the previous exercises of statutory discretion in which we have authorized alien ownership levels in excess of that proposed by MCI.[43] As noted above, in addition to being a U.S. corporation, MCI will have 80 percent U.S. directors and 100 percent U.S. officers. We additionally note that, because the Title III licensees involved are common carriers and exercise no control over the content of the transmissions, they do not raise the traditional Title III concerns about alien control over the operation of U.S. radio services.[44] Finally, we observe that BT's substantial equity contribution will facilitate MCI's ability to expand and improve network services and products that it may offer to American consumers, stimulating U.S. economic growth and creating new job opportunities.[45] We find, thus, that the proposed 3% fluctuation in non-BT alien ownership above the 25% statutory benchmark is not inconsistent with the public interest.[46] Based on the specific facts presented to us, we find no public interest reason under Section 310(b)(4) to deny this petition.

C. Applicability of Comparable Market Access Standard

24. Both AT&T and Sprint argue that we should either require comparable access to the U.K. market as a prerequisite to granting the petitioners' request for a favorable declaratory ruling on Section 310(b)(4) or, in the alternative, defer action pending completion of a rulemaking on the regulation of market access by U.S. carriers with foreign affiliates. Specifically, AT&T argues that BT is gaining access to the U.S. market through its 20 percent interest in MCI. In its petition for rulemaking, AT&T has requested that we apply a five percent investment threshold for purposes of determining when a U.S. carrier is affiliated with a foreign carrier, and, thus, what constitutes market entry.[47] Under AT&T's proposal, BT's investment in MCI/would be considered market entry and, thus, subject to a comparable market access standard.[48] ACC and Sprint also argue that a favorable Section 310(b)(4) public interest determination should address the concerns raised regarding comparable market access and leveraging of market power. Specifically, they argue it should be made contingent upon competitors being offered commercially reasonable interconnection with BT for at least a one-year period (ACC), and international facilities-based entry in the United Kingdom along with nondiscriminatory conditions (Sprint).

25. Upon review of the comments, we conclude that the imposition of safeguards through a §310(b)(4) public interest determination would be inadequate to address such concerns, as any safeguards could be rendered moot by restructuring the transaction prior to closing to fall within the alien ownership benchmarks.[49] Furthermore, we ob-

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[39] *PrimeMedia Broadcasting, Inc.*, 3 F.C.C. Rcd 4293, 4295 (1988).

[40] *See, e.g., GRC Cablevision, Inc.*, 47 F.C.C. 2d 467, 30 R.R. 2d. 827 (1974); *IDB Communications Group, Inc.*, 6 FCC Rcd 4652 (Com. Car. Bur. 1991); and *Teleport Transmission Holdings*, 8 FCC Rcd 3063 (Com. Car. Bur. 1993).&

[41] *See Millicom*, 4 FCC Rcd 4846 (1989).

[42] *Teleport Transmission Holdings* at 3065.

[43] *See, GRC Cablevision, Inc.*, 47 F.C.C. 2d 467, 30 R.R. 2d. 827 (1974); *GCI Liquidating Trust*, 7 FCC Rcd 7641 (1992); *Teleport Transmission*, 8 FCC Rcd 3063.

[44] *See, e.g., Millicom*, 4 FCC Rcd at 4847; *Teleport Transmission*, 8 FCC Rcd at 3064-65.

[45] For example, MCI has announced a $20 billion plan to upgrade its long-distance network in order to provide a range of voice, video and high-speed data communications services. More specifically, MCI intends to upgrade its network with a new fiber optic technology -- SONET (synchronous optical network) -- that can transmit up to 2.5 billion bits of data per second. *See* New York Times, Business Day Section, January 5, 1994. We also note that approval of this alliance is consistent with key principles of the Buenos Aires Declaration, such as the promotion of competition and private investment in the National Information Infrastructure, aimed at furthering the goal of a Global Information Infrastructure.

[46] Our finding that the 28 percent alien ownership is not inconsistent with the public interest is limited to the current structure of the foreign investment, as described in the Joint Petition.

[47] *See supra* note 9.

[48] In its Reply Comments, CWI notes that there are no analogous foreign ownership limitations in the U.K. licensing scheme. Indeed, U.S. West is a 50 percent equity partner with Mercury Communications in a wireless personal communications network in the United Kingdom. *See* CWI Reply Comments at ¶ 3.

[49] AT&T also notes that the limitations of Section 310 can often be overcome by the corporate structure or contractual arrangements employed by the applicant. *See* AT&T Petition for Rulemaking at 14, note 11. BT and MCI note that, should the alien ownership in MCI fall within the benchmarks prior to closing, any safeguards imposed through a conditional public interest determination would be rendered moot. *See* BT and MCI Joint Reply Comments at 8-11.

serve that it is not the 28% alien ownership itself that gives rise to the commenters' specific competitive concerns about leveraging of foreign market power and lack of comparable market access, but rather BT's limited 20 percent interest in MCI.

26. We do not agree with Sprint and AT&T that we should require comparable market access to the U.K. market as a prerequisite to granting the petitioners' request for a declaratory ruling. The development and application of such an approach is a broad policy change that is appropriately done in a rulemaking proceeding, not in a declaratory ruling. We also conclude that, while the issues Sprint and AT&T raise may be indicative of a need to take a comprehensive look at how we evaluate foreign carrier entry into the U.S. telecommunications market, the public interest is better served by not delaying our action on the petition for declaratory ruling until we have acted on AT&T's request for a general rulemaking proceeding. We are convinced that delaying action on this petition for the period of time necessary to complete a rulemaking proceeding involving such highly complex issues would seriously jeopardize the successful closing of this transaction, thus denying the public the benefits we anticipate as a result.[50] We conclude that MCI's commitments and the reporting requirements in this order are sufficient to protect against BT's abuse of its market power. We, accordingly, do not believe it is appropriate to defer this transaction pending Commission action on AT&T's petition for rulemaking.

27. We thus evaluate this transaction in accordance with existing Commission precedent. In *Optel Communications, Inc.*,[51] the Commission determined that the acquisition of a non-controlling 20 percent equity interest, accompanied by proportionate Board representation, by a foreign monopoly carrier in the U.S. cable operator that owns the U.S. end of a private international submarine cable, did not constitute entry into the U.S. market for purposes of raising the reciprocity provision of the Cable Landing License Act.[52] We find the relevant facts before us to be substantially similar concerning the general question of what might constitute market entry. In this instance, BT is acquiring a non-controlling 20 percent interest and proportionate Board representation in MCI, which is a U.S. corporation.[53] Therefore, consistent with the market entry determination in *Optel*, we find that BT's 20 percent interest does not rise to the level of ownership that constitutes carrier entry into the U.S. telecommunications market.

28. Even if BT's interest were considered market entry, as noted above we have not to date adopted a policy of requiring comparable market access as a condition of entry by foreign carriers. Nonetheless, it is noteworthy that the U.K. telecommunications market is one of the most liberalized markets in the world, and certainly the most liberalized market in the European Union. In fact, the United Kingdom has few regulatory barriers to entry and has no foreign ownership limitations on U.K. carriers. Basically, the United Kingdom permits competition in all services, with the notable exception of international facilities-based services. Although the U.K. government has formally withdrawn its "duopoly policy", it has not expressed a willingness to contemplate authorization of additional international facilities-based competition to BT and Mercury Communications, Ltd. In the last year, however, the Department of Trade and Industry (DTI) and Office of Telecommunications (OFTEL) have taken considerable steps toward creating a regulatory regime under which effective competition to BT may eventually emerge, particularly if a standard, nondiscriminatory interconnection framework is in place. Examples of the openness of the U.K. telecommunications market include DTI's recent grants of several domestic facilities-based and international simple resale licenses to U.S. carriers, including Sprint, WorldCom, MFS Inc., ACC and City of London Telecommunications (COLT), the recent announcement of the U.K. government's intent to grant the pending license of AT&T, and the existing cable/telco competition, where U.S. carriers such as NYNEX and US West are quite active.

D. Other Competitive Concerns

29. We also recognize the public interest concerns raised by the majority of the commenters in this proceeding regarding the effect that the BT and MCI alliance may have on competition in the telecommunications market as a result of the potential for either discrimination or other anticompetitive conduct. We agree that these concerns are relevant and important in determining whether further action is necessary pursuant to our public interest consideration under Sections 214 and 316 of the Communications Act, and other relevant statutory provisions,[54] and our enforcement responsibilities under the Clayton Act.[55] Accordingly, in the following sections, we evaluate the competitive concerns that flow from the transaction, and, in particular, balance the procompetitive benefits of the joint venture against any potential anticompetitive effects.

30. The record identifies the following principal areas in which the BT/MCI alliance raises concerns about a potential adverse effect on competition.[56] First, BT could leverage its dominant position in both the U.K. international and local exchange markets to favor MCI and NEWCO to the disadvantage of competing U.S. international carriers. This favorable treatment could manifest itself in a variety of ways, such as preferential pricing or the provision of technical network information in advance of such disclosure to other U.S. carriers.

31. Second, the parties have, in effect, entered into a perpetual geographic market division agreement through the loss of rights provision in the Agreement.[57] Pursuant to this provision, MCI is restricted to direct sales and market-

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[50] *See supra*, ¶23.

[51] 8 FCC Rcd 2267 (1993), *petition for recon. pending.*

[52] 47 U.S.C. §35.

[53] Although MCI may have up to 28 percent alien ownership, BT's ownership level is no greater than 20 percent. *See supra* ¶19 and note 46.

[54] *See, e.g., FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1952)(there can be no doubt that competition is a relevant factor in weighing the public interest); *United States v. Federal Communications Comm'n*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (competitive considerations are an important element of the public interest standard).

[55] Under Section 702(d) of the Communications Act, 47 U.S.C. §702(d), and Section 11 of the Clayton Act, 15 U.S.C. §21, we are charged with enforcing, *inter alia*, Section 7 of the Clayton Act, 15 U.S.C. §18.

[56] We note that these are similar concerns to those that are the subject of Justice's civil antitrust complaint. *See* ¶ 5, *supra*.

[57] See Agreement at Article 9.12.

ing of its telecommunications services in the Americas and the Caribbean, and BT is restricted to direct sales and marketing in the remainder of the world.[58] This territorial allocation is not limited to the exclusive distribution of NEWCO products and offerings, but extends to the provision of all BT and MCI telecommunications services. This restriction also raises competitive concerns. We examine all of these concerns below.

a. Leveraging of Foreign Market Power

32. The record reflects specific concerns that BT's proposed investment in MCI and the formation of NEWCO will create incentives for BT to leverage its home market powerd in favor of MCI over competing U.S. carriers. The parties argue that BT's substantial equity investment in MCI, and its interest in the NEWCO Joint Venture, create a distinct financial incentive for BT to use its dominant position in U.K. telecommunications markets to discriminate in favor of MCI over competing U.S. international carriers.[59] AT&T, Sprint and ACC argue that BT and MCI will be able to leverage BT's control of 97 percent of the local access lines to the advantage of their alliance.[60] Furthermore, they argue, BT and MCI have the incentive and ability to enter into exclusive arrangements by directing all international switched and private line traffic to each other, unless regulatory conditions preclude such activity.

33. In response to the assertions that BT and MCI will engage in unlawful discrimination and enter into exclusive arrangements for the provision of international basic telecommunications services,[61] the petitioners reaffirm their intent to continue their correspondent relations with other international carriers. Moreover, the petitioners state that neither will impermissibly exclude competitors from the market for regulated basic resale services or unlawfully discriminate in favor of the other in accounting rates and settlements.

34. Given our determination that there is no transfer of control of MCI to BT, our current regulatory framework classifies MCI presumptively as nondominant on all routes, including the U.S.-U.K. route.[62] Although none of the parties argues that BT is taking a controlling interest,[63] the majority of the comments nonetheless expresses serious concern that this alliance, including the NEWCO Joint Venture, creates a financial incentive for BT and MCI to engage in discriminatory or preferential dealings.[64] The commenters thus urge the Commission to imposeh certain operational and nondiscrimination safeguards on the transaction.

35. The petitioners counter that these concerns are not appropriately raised in the context of a petition for declaratory ruling, but are more appropriately considered in either a rulemaking proceeding or in the processing of individual Section 214 applications.[65] The petitioners further argue that the recent *International Services Order*[66] rejected the position that a less-than-controlling interest in a U.S. carrier raises sufficient concerns of discrimination to require dominant carrier regulation. Finally, MCI responds to the concerns about the potential leveraging of market power by BT in favor of MCI by undertaking to file an application to amend all of its existing Section 214 certificates for the provision of international telecommunications services with a "no special concessions" clause. Specifically, MCI has committed to the Commission "not to accept, directly or indirectly, any special concessions from any foreign carrier or administration with respect to traffic or settlement flows between the U.S. and any foreign country.[67] To give timely effect to this commitment, MCI has undertaken to file within 5 days of the release of this

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[58] MCI's perpetual loss of rights provision has been limited to five years for the European Economic Area (EEA), which includes the 12 Member States of the European Union and Austria, Sweden, Norway, Finland, and Liechtenstein, as a result of an agreement the parties have entered into with the European Union. *See* Notice Pursuant to Article 19(3) of Council Regulation No. 17 and Article 3 of Protocol 21 of the EEA Agreement Concerning a request for negative clearance or an exemption pursuant to Article 83(3) of the EC Treaty and Article 53(3) of the EEA Agreement - Case No IV/34.857 -- BT-MCI (94/C 93/03), para. 32.

[59] *See* AT&T Comments at 2; *see also* Sprint Comments at 3, 12.

[60] More specifically, ACC argues that "this transaction has the ability to impede the development of competition in international telecommunications services" because "BT so dominates the U.K. domestic market through its bottleneck control of domestic facilities that interconnection to BT is the sine *qua non* of competitive service" and that the "U.K. duopoly' policy for the provision of international facilities-based services leaves BT's market power virtually unchecked". *See* ACC Comments at 4.

[61] *See* AT&T Comments at 2 and Sprint Comments at 3, 4, 12.

[62] In the *International Services Order*, we adopted a framework under which carriers that have no "affiliation" with a foreign carrier in the destination market are presumed nondominant for that route. *S ee Regulation of International Common Carrier Services*, 7 FCC Rcd 7331 (1992), *errata*, DA 93-26, released January 19, 1993. We adopted this rebuttable presumption based on our conclusion that, absent a controlling interest in a U.S. carrier, a foreign carrier would be unable to direct the actions of the U.S. carrier, and the U.S. carrier would be unwilling to risk sanctions by the Commission for discriminatory conduct that violates Commission rules or policy, or any conditions of its Section 214 certificate. *Id.* We also noted that U.S. carriers are subject to ongoing reporting requirements that are designed to detect discrimination by foreign carriers or administrations in favor of specific U.S. carriers. We retained the option to impose or reimpose dominant carrier regulation on a particular carrier which either has or is likely to engage in discriminatory practices. *Id.*

[63] Sprint, however, argues that BT's equity interest and participation in MCI allows significant influence on MCI's corporate affairs. *See* Sprint Comments at 3. Sprint points to, *inter alia*, the covenant that BT and MCI shall not compete in the core businesses in each other's respective territories. We address these concerns in ¶ ¶ 47-54, *infra*.

[64] *See* AT&T Comments at 2; Sprint Comments at 3, 8-12; and ACC Comments at 4.

[65] *See* BT and MCI Reply Comments at 11-14.

[66] *See supra*, note 62.

[67] *See* Letter from Donald F. Evans, Director, Federal Regulatory Affairs, MCI Communica tions Corporation to William F. Caton, Acting Secretary, Federal Communications Commission (dated January 13, 1994). Section 63.14 of the Commission's Rules defines special concessions as any arrangement that affects traffic or revenue flows to or from the United States that is offered exclusively by a foreign carrier or administration to a particular U.S. international carrier and not also to similarly situated U.S. international carriers authorized to serve a particular route. *See* 47 CFR Section 63.14.

order its application to amend all of its existing Section 214 certificates. In keeping with its commitment to accept "no special concessions" directly or *indirectly* from BT, MCI shall also obtain a written commitment from BT not to offer or provide any special concessions to NEWCO in BT's provision of basic telecommunications services or facilities. A copy of this written commitment should be filed with the Commission fifteen (15) days prior to consummation of this transaction. Furthermore, MCI has also committed to the Commission to maintain records on the provisioning and maintenance of facilities and services by BT to MCI, including, but not limited to, services or facilities procured on behalf of customers of NEWCO offerings, in the United Kingdom.[68] MCI will make these reports available upon request by the Commission.

36. Although our rules presume that a less-than-controlling alien interest in a U.S. carrier would not normally raise sufficient competitive concerns to warrant dominant carrier regulation, we agree with commenters who suggest that this transaction is unique in light of the parties involved and the related Joint Venture. On the U.K. end, BT is currently the dominant carrier in a duopoly for the provision of international facilities-based services, controls 97 percent of the local termination points, and has the most fully developed long distance network to which interconnection is essential for the distribution of international traffic. On the U.S. end, MCI is the second largest interexchange carrier and international service provider in the market and, as such, maintains a significant U.S. customer base. BT's 20 percent interest in such a major U.S. carrier, coupled with its participation on MCI's Board of Directors, may provide BT with the incentive both to discriminate in favor of MCI and to influence the corporate decision-making process of MCI. In addition, BT and MCI have jointly created NEWCO which, at least initially, will develop and market enhanced service products. BT and MCI will then exclusively distribute NEWCO's enhanced service products, which, for their successful provisioning, may require access to the basic services network controlled by BT in the United Kingdom. Finally, we note that the territorial allocation provision (*see* ¶47, *infra.*) and loss of rights provisions in the Investment Agreement force BT to rely upon its 20 percent investment in MCI as a primary source of revenues from the U.S. telecommunications market. Thus, in spite of the fact that MCI and BT are not "affiliated" within the meaning of our rules, we believe that these factors create additional incentives for BT to favor MCI, directly or indirectly.

37. Despite the incentives for MCI to be offered an unfair competitive advantage over competing U.S. carriers by virtue of its relationship with BT, we conclude that dominant carrier regulation is not necessary for MCI because we believe that the safeguards imposed in this order are sufficient to ensure that the parties do not engage in anticompetitive activities.[69] We Eare satisfied that the safeguards imposed in this Order, pursuant to existing Commission policy and Section 218 of the Communications Act, in conjunction with MCI's undertakings to accept "no special concessions" and to maintain provisioning and maintenance records, effectively address the concerns about anticompetitive conduct raised in the record.[70] For example, the amendment of MCI's international Section 214 certificates to include a "no special concessions" obligation would preclude MCI from accepting from BT, or from any other foreign carrier or administration, preferential or exclusive operating agreements or marketing arrangements for the provision of basic telecommunications services, including the introduction and provision of new basic services.[71] Similarly, MCI's amended certificates would preclude it from accepting from BT any distribution or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operational characteristics, such as provisioning and maintenance times, at rates or on terms and conditions that are not available on a nondiscriminatory basis to all competing U.S. carriers. In these examples, MCI's commitment to maintain provisioning and maintenance records enhances the Commission's ability to monitor MCI's compliance with its obligation to accept no special concessions from BT. MCI's amended certificates would also prohibit MCI from agreeing to accept any arrangement with BT for the joint handling of basic traffic originating or terminating in third countries on terms and conditions not available on a nondiscriminatory basis to all competing U.S. carriers. Moreover, MCI's "no special concessions" clause would bar it from entering into preferential arrangements with BT that concern international traffic flows to and from third countries.

38. With respect to concerns that BT and MCI could use their relationship to manipulate traffic streams or accounting rates, we reiterate our belief that existing Commission policy with respect to these matters effectively limits the parties' ability to engage in such anticompetitive conduct.

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[68] We note that the civil antitrust complaint and Final Judgment filed by the Department of Justice reflect concerns about the potential discrimination by BT in favor of MCI in this area, and that the disclosure requirement imposed in Section II A.5. of the Final Judgment would provide additional monitoring capability.

[69] We note that nothing in the record indicates that there is any need for several key provisions of dominant carrier regulation, such as filing of tariffs on 45-days notice, requirement of cost support justification, and prior Section 214 authorization for circuit additions. We believe these restrictions would be needlessly burdensome in this context.

[70] We note that MCI's failure to comply with its commitments not to accept any special concessions and to maintain provisioning and maintenance records may result in the imposition of fines or forfeitures upon MCI (see Sections 502 and 503 of the Act, 47 U.S.C. §§502 and 503) or a revocation of its licenses (*see* Section 312(a) of the Act; *Pass Word*, 76 FCC 2d 465 (1980), *aff'd*, 673 F.2d 1363 (D.C. Cir. 1982) (common carrier license revoked based on carrier's deliberate misrepresentation to the Commission)).

[71] We note the concern that BT may offer, as part of an incentive to purchase its basic telecommunications services in the United Kingdom, a discount or preference based on the U.K. customer's selection of MCI as its U.S. carrier. Under its "no special concessions" undertaking, however, MCI may not knowingly participate in the handling of any U.K.-U.S. basic telecommunications service for which BT has offered a discount conditioned upon selection of MCI as the U.S. carrier for such service. For example, MCI may not accept from BT a plan where BT customers are offered a discounted rate on either domestic or international private line service if the other half of the international private line is procured from MCI.

A U.S. carrier must: (i) accept only its proportionate share of return traffic from its foreign correspondent;[72] (ii) settle its accounts in accordance with the nondiscriminatory accounting rates it is required to file with this Commission; (iii) file copies of all contracts, agreements and arrangements that relate to the routing of traffic and settlement of accounts;[73] and (iv) not agree to accept any changes in its accounting rates that are not made equally available to all other competing U.S. carriers on a nondiscriminatory basis.[74] Moreover, pursuant to its "no special concessions" undertaking, MCI is precluded from bargaining for, or accepting, any preferential changes in the current method used by BT to allocate return traffic among U.S. carriers.

39. Although MCI has undertaken to maintain provisioning and maintenance records, we find it necessary, given the unique aspects of this transaction, to modify and impose certain reporting requirements for MCI on its U.S. - U.K. route in order to enhance further the Commission's ability to monitor and enforce MCI's obligation to comply with its "no special concessions" and other nondiscrimination obligations.[75] First, we require that MCI make its monthly circuit status reports for U.S.- U.K. circuits publicly available on a quarterly basis.[76] Second, we require MCI to file with the Common Carrier Bureau notification of each addition of circuits on the U.S. - U.K. route, specifying the joint owner. Third, we require MCI to file with the Commission quarterly reports of revenue, number of messages and number of minutes of both originating and terminating traffic between the United States and the United Kingdom within 90 days from the end of each calendar quarter. These traffic and revenue reports shall be publicly available upon filing with the Commission. While there is no evidence that either BT or MCI intends to operate in a manner inconsistent with Commission rules or policy, we believe that these reporting requirements are warranted and not unduly burdensome in light of the unique nature and details of the alliance of MCI and BT.

40. With respect to the NEWCO Joint Venture itself, both AT&T and Sprint have raised general concerns about potential discrimination and exclusive dealings arising in that context. BT and MCI maintain that the NEWCO Joint Venture Agreement is not relevant to the requested declaratory ruling. Specifically, BT and MCI note that the Joint Venture Agreement creates NEWCO as an entity to develop end-to-end enhanced (or, "value-added") service products and offerings.[77] They further note that the Joint Venture Agreement establishes BT and MCI as the sole distributors to customers in their respective territories of the products and services developed by NEWCO.[78] Further, BT and MCI insist that NEWCO will not engage in the actual provision of any basic or enhanced telecommunications services to customers.[79] As BT and MCI will be the service providers to customers, they maintain that NEWCO is not subject to Title II regulation.

41. The Commission does not regulate the provision of enhanced services under Title II of the Communications Act, even when offered by companies that operate otherwise as common carriers.[80] Any entity that provides interstate or international basic telecommunications service on a common carrier basis is subject to Title II regulation, including applicable entry and tariffing requirements. As discussed above, petitioners claim that NEWCO itself will not be a basic or enhanced service provider, and, therefore, will not be subject to regulation by this Commission. For this reason, they have not submitted the NEWCO Joint Venture Agreement and other related documents to us, and assert they are not relevant to this declaratory ruling proceeding.

42. Because NEWCO is reportedly not planning to provide any U.S. common carrier services, we make no finding as to the appropriate regulatory status of NEWCO. Nonetheless, we recognize the concerns in the record raised by BT's participation in NEWCO and the exclusive BT and MCI distributor relationship, when combined with BT's 20 percent stake in MCI. This particular combination of factors may, for example, give BT an incentive to provide MCI preferential access to BT's basic services network

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[72] This merely restates the general obligation of all U.S. international carriers to accept only their proportionate share of return traffic. *See Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, *Second Report and Order & Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 8040 (1992) at para. 30.

[73] This would include, for example, agreements for the proportionate return of traffic, even where the agreement is not written. *See* Section 43.51(b) of the Commission's Rules, 47 CFR Section 43.51(b).

[74] We note that the Final Judgment shares the policy concerns behind our existing requirements. The Final Judgment provides additional monitoring for interested parties through the disclosure requirements relating to accounting rates and other related terms and conditions, as well as the allocation of return traffic, imposed on MCI in Section II.A.3.

[75] We reserve the right to extend to additional U.S. - international routes the reporting requirements contained in this order in the event BT or MCI enters into a similar alliance or acquires an "affiliation" with any other "foreign carrier," as those terms are defined in Section 63.01(r)(1)(i) and (ii) of the Commission's Rules, 47 C.F.R. §63.01 (r)(1)(i),(ii).

[76] We note that the Commission has issued a Notice of Proposed Rulemaking (NPRM) which proposes to require U.S. carriers to file circuit status reports on an annual instead of a monthly basis. *See* 8 FCC Rcd 4902 (July 2, 1993). This proceeding is still pending. As to MCI, however, based on the concerns raised in this proceeding, we are convinced that MCI should continue to file monthly reports on the U.S. - U.K. route regardless of whether the Commission adopts a new rule. We find that a monthly report of circuit status is necessary to ensure our ongoing ability to monitor MCI's circuit growth on the U.S. - U.K. route.

[77] These end-to-end enhanced services would support the private networks of international telecommunications users. For the definition of enhanced services, *see* 47 CFR §64.702.

[78] *See* BT and MCI Reply Comments at 4. Pursuant to the loss of rights provision in the Agreement, MCI is for its "core businesses" limited geographically to the Americas and the Caribbean, while BT is limited to the remainder of the world for such "core businesses". For further discussion and definition ofh)"core businesses", *see* ¶47, *infra*.

[79] *See supra*, EC Notification at note 58.

[80] Second Computer Inquiry, 77 FCC 2d 384 (1979) (Final Decision), *aff'd on reconsideration*, 84 FCC 2d 50 (1980), 88 FCC 2d 512 (1981), *aff'd sub nom.*, CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom.* Louisiana P.S.C. v. United States, 461 U.S. 938 (1983). *See also Third Computer Inquiry* 104 FCC 2d 958 (1986). The Commission, however, retains jurisdiction over the provision of enhanced services under Title I of the Act.

that is necessary for the delivery of U.S. enhanced services both within and into the United Kingdom.[81] This potential discrimination could take various forms, including preferential pricing or treatment in the provision and maintenance of both international half-circuits and of local exchange services, directly or indirectly, to MCI or advance disclosure of technical specifications. We find, however, that many of the concerns about the potential leveraging of foreign market power in basic service offerings to gain an advantage in the enhanced services market are satisfactorily addressed by the "no special concessions" and recordkeeping commitments that MCI has made to the Commission, *supra*, at ¶35.

43. After amendment of its existing international Section 214 certificates as proposed by MCI, those certificates would, for example, prohibit MCI from accepting directly from BT, prior to public disclosure, any information about BT's basic network services, including such changes in services, that affect either the provision of enhanced services or the interconnection of the network services of U.S. carriers or of their U.S. customers.[82] In addition, the amendment would prohibit MCI from accepting any special concessions indirectly from BT through the NEWCO joint venture. Thus, for example, MCI would be prohibited from accepting from NEWCO prior to public disclosure information regarding BT's basic network services, including changes in such services, that affect either the provision of enhanced services or the interconnection of the network services of competing U.S. carriers or of their U.S. customers.[83] As a further example, MCI would be prohibited from receiving either directly or indirectly, through NEWCO or from BT, any confidential information obtained by BT from competing U.S. carriers in the course of regular business activities with such U.S. carriers, such as the provision of interconnection or other necessary services, correspondent relationships, or negotiations of operating agreements, including accounting rates.[84] Moreover, MCI's undertaking to maintain complete records on the provisioning and maintenance of facilities and services by BT to MCI specifically includes any services or facilities procured on behalf of customers of NEWCO offerings in the United Kingdom.[85] MCI also undertakes to make these records available to the Commission upon request, which enhances our ability to monitor MCI's compliance with its commitment to accept "no special concessions".[86]

44. Finally, our consideration of the adequacy of our safeguards takes into account both the U.K. regulatory framework, which essentially allows open entry into most segments of the U.K. telecommunications market, and the emerging competition to BT in the United Kingdom. We recognize that the U.K. telecommunications regulators are undertaking a significant review of several important issues that may affect any ability BT may have to use its market power to advantage MCI unfairly. For example, the Director General of Telecommunications, Office of Telecommunications (Oftel), recently released a statement proposing a three stage program on an interconnection and accounting separation regime for BT.[87] In addition, we note that BT's PTO license currently contains broad nondiscrimination obligations. Although we do not consider the future effectiveness of the regulation of the U.K. market to be the litmus test for whether BT has the ability to exercise its market power in favor of a particular U.S. carrier,[88] it is nonetheless germane to our analysis that considerable regulatory steps have been, and should continue to be taken, to facilitate the development of effective competition to BT.

45. While it is important to consider the regulatory framework of a foreign country, it is also important to consider the degree of liberalization of that country's telecommunications market. The pressures of a competitive telecommunications market minimize the ability of a carrier to engage in unfair discriminatory practices. As noted in Paragraph 28, *supra*, several U.S. telecommunications carriers, such as IDB WorldCom, Sprint, MFS Inc., and ACC, have entered the local and national facilities-based telecommunications services markets in the United Kingdom, providing some competition to BT. We also note that the United Kingdom has announced its intent to grant the pending AT&T PTO license, which will authorize AT&T to provide, *inter alia*, domestic facilities-based services and international resale services. In addition, both NYNEX and US West are providing telephony service via some of their cable facilities in competition with BT. In the international services market, Mercury Communications, Ltd., the second facilities-based carrier, and several resellers, including U.S. carriers such as Sprint and WorldCom, are providing international services competition to BT. Nonetheless, absent further international facilities-based competition to BT in the United Kingdom, there may remain some potential for BT to manipulate its market power in the U.K. - international market to the detriment of competing U.S.

[81] *See* Sprint Comments at 11.

[82] This provision would also prohibit MCI from accepting from BT proprietary information that any competing U.S. carrier had supplied to BT, unless specific permission has been obtained in writing from the U.S. carrier involved.

[83] All references to MCI, BT and NEWCO in this order include their respective officers, directors, and employees, as well as any affiliated companies and their officers, directors and employees.

[84] We again note that the Final Judgment shares our concerns, and imposes confidentiality requirements on both MCI and NEWCO in Section II B-D.

[85] We delegate to the Common Carrier Bureau the task of working with MCI to establish the manner in which it may satisfy this record-keeping obligation.

[86] We observe that we also have the right to require MCI to provide us with this information pursuant to our authority under Section 218 of the Act.

[87] The first stage established a basis for interim interconnection charges for interconnection with BT. The second stage, involving amendments to BT's license, runs from March 1994 to January 1995, and covers implementation of a standard list of interconnection charges, cost transparency, and accounting separation of the retail, network and access elements of BT services. The third stage involves a longer term consideration of such issues as the future of access deficit charges, alternative costing bases, and alternative charging structures for interconnection services. There is no certain timing on the conclusion of this third stage of the program. In this statement, the Director General recognizes that fair, efficient and sustainable interconnection is vital to maintaining a competitive telecommunications market. *See* Oftel Document, Interconnection and Accounting Separation: The Next Steps.

[88] This approach is consistent with the view that competition,

international carriers.[89] As the U.K. framework evolves, however, we fully expect BT to face increasingly effective competition in local, national and international telecommunications services which should continue to constrain any ability BT may now have to act in an anticompetitive manner.

46. Therefore, in light of the U.K. regulatory framework and the relative openness of the U.K. telecommunications services market, we find that MCI's "no special concessions" and record-keeping commitments and the other safeguards imposed in this order are both necessary and sufficient at this time to guarantee competing U.S. carriers, and their customers, access on a nondiscriminatory basis to basic services from the parties to this alliance. We believe that these safeguards are sufficient to protect against MCI's participation in, or acceptance of, competitive advantages due to any direct or indirect efforts by BT to abuse its market power. With the exception of the monthly circuit status reports, these regulatory requirements are subject to modification as a result of any action the Commission may take in any relevant future proceeding of general applicability.

b. Territorial Allocation

47. Article 9.12 of the Agreement restricts BT's ability to provide "core business" services in MCI's designated territory (the Americas and the Caribbean), and restricts MCI's ability to provide these services in BT's territory (the remainder of the world). A party breaching these restrictions is subject to a loss of certain of its rights. This covenant runs in perpetuity, with no time limit of any kind (other than the five-year limitation for the EEA imposed by the Commission of the European Communities).[90] "Core business" is defined as:

> "All telecommunications and other electronic information services and equipment for the provision of such services, as they exist on the date of this Agreement or hereafter exist, including, without limitation, all forms of telecommunications access and egress (landline and wireless), and value-added consumer and business services generated through or as a result of underlying telecommunications services using all technology (voice, data and image) and physical transport, network intelligence, and software applications, and including, without limitation, (i) information processing, (ii) systems integration and outsourcing, (iii) transaction processing and (iv) cable television." Investment Agreement, Article 1.1 at 3-4.

Given these terms, the Agreement applies not just to the distribution of NEWCO's products, but also to virtually any service, basic or enhanced, offered by the parties.

48. Furthermore, pursuant to these restrictions embodied in Article 9.12 of the Agreement, it appears that BT and MCI will not be providing service in competition with each other in particular territories, except for the possibility of passive and remote sales, as discussed in Paragraph 53 *infra*. This could be viewed as a territorial allocation. While such horizontal restraints may be deemed *per se* violations of the Sherman Act, 15 U.S.C.[91] where the territorial allocation is reasonably ancillary to a joint venture that has a legitimate business justification, the restraint can be judged under a "rule of reason" analysis.[92] We conclude, for the reasons discussed\below, that the parties' territorial allocation will likely be of little direct competitive consequence.[93]

49. First, we question whether the territorial allocation has anticompetitive consequences in any relevant market. With respect to the U.S. telecommunications market, BT has previously demonstrated an active interest in the U.S. market and has attempted entry through both Syncordia and BT-Tymnet. Thus, BT, absent this transaction, may well have elected to enter the U.S. telecommunications market on its own.[94] On balance, however, even if BT were viewed as a potential entrant, there does not appear to be any anticompetitive effect from the territorial allocation provision which precludes BT's entry into the U.S. telecommunications market. Today, there are several hundred carriers, both facilities- and resale-based, competing in the U.S. interexchange market. Indeed, the number of existing interexchange carriers, and other potential entrants, suggests that the loss of the incremental competition that might be provided by BT's independent entry into the U.S. telecommunications market would appear to be of little competitive significance.

50. A second market in which the parties' agreement might have a competitive effect involves the provision of international telecommunications services between the

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not government regulation, is the most effective, and therefore the preferred, solution to curtail the abuse of foreign market power. *See International Services Order* at 7333-34.

[89] BT has approximately a 75% market share of the U.K. - international facilities-based traffic, while Mercury Communications Ltd. has approximately a 25 percent share.

[90] *See* note 58, *supra*.

[91] *Per se* violations will be struck down under Section 1 of the Sherman Act without further inquiry into the business or economic justification, impact on the market, or reasonableness of the restraint. *See United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); *United States v. Seal y, Inc.*, 388 U.S. 350 (1967). The fact that the parties to a market division are potential, as opposed to actual, competitors does not redeem an otherwise *per se* violation. *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990)(per curiam).

[92] *See Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *see also Rothery Storage and Van Co. v. Atlas Van Lines*, 792 F.2 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) (horizontal refusal to deal associated with joint venture analysis under rule of reason). Such an analysis delves into the reasonableness of the restraint in light of its economic justification and competitive effects.

[93] We note, however, as discussed at ¶36, that the territorial allocation provision creates additional incentives for BT to favor MCI and NEWCO.

[94] We recognize that Section 310 of the Act limits aliens' ability to hold Title III radio licenses, and sets direct and indirect alien ownership and participation benchmarks in certain Title III radio licensees. Nonetheless, Section 310(b)(4) of the Act provides the Commission with the discretion, as illustrated in this order, to allow alien ownership and participation beyond these benchmarks where to do so is in the public interest. Moreover, we emphasize that Section 310 of the Act applies solely to wireless, not wireline, facilities. Hence, carriers such as Cable & Wireless North America are able to provide nationwide service via fiber optic facilities.

United States and the United Kingdom. Again, absent this transaction, BT may have been a potential independent entrant in the U.S. international telecommunications market. This scenario is supported by the fact that BT North America (BTNA), a wholly-owned U.S. subsidiary of BT, has an international Section 214 application pending for the (1) resale of switched services; (2) resale of private lines for non-interconnected private line services; and (3) resale of private lines for switched services.[95] In this market, we note that there are approximately 10 international facilities-based carriers and hundreds of international resellers providing U.S. - U.K. telecommunications services.[96] We thus similarly conclude that the number of existing and potential competitors indicates that the territorial allocation provision does not significantly lessen potential competition in the provision of U.S. - U.K. telecommunications services.[97]

51. A third market in which this transaction may have a competitive impact involves the provision of seamless, global service to high-end users, such as multinational companies -- the market at which NEWCO's products are aimed. However, as of yet, there appears to be no actual global provider of the seamless services proposed by the NEWCO joint venture, though a number of firms appear to be positioning themselves to provide these services on a fully global basis.[98] Thus, BT and MCI argue that the impact of the NEWCO joint venture on the market for the provision of seamless, global services will actually be procompetitive because it will hasten its development through the introduction of new products that might not otherwise be provided. Moreover, BT and MCI argue that the venture will not foreclose entry by other providers potentially waiting in the wings. [99] With respect to MCI's foreclosure from direct participation in some foreign markets, we note that MCI's recent forays into the foreign international telecommunications markets, such as Mexico and Canada, have taken the form of alliances with local partners.[100] Given the evolving structure of this nascent market, the fact that NEWCO will arguably be its first entrant, and the potential for entry by other providers, it appears that the BT/MCI transaction is likely to have a procompetitive, not an anticompetitive, effect in this global market.

52. Moreover, the territorial allocation is not absolute and, in fact, appears to preserve some flexibility to each party for the provision of services outside of it respective territories. PFirst, the Agreement is constructed so that a breach of the territorial allocation provision does not terminate the Agreement, but rather triggers a loss of rights of the party in breach. On MCI's part, the loss of rights would include an end to the restrictions on: (1) BT's ability to acquire additional shares of capital stock; (2) BT's voting of shares; (3) BT's acquisition of MCI stock; (4) BT's ability to amend, modify or waive provisions in the Investment Agreement, By-Laws or Certificate of Incorporation; (5) BT's ability to transfer its interest in MCI; and a loss of MCI's right of first refusal on certain proposed transactions or transfers of rights.[101] BT's loss of rights would include (1) the conversion of its Class A stock to shares of common stock, (2) loss of access to financial information, (3) elimination of the restriction on MCI's right to solicit acquisition proposals, (4) loss of right to engage in an auction if MCI is put up for sale, (5) loss of right to force the sale of non-core business acquisitions by MCI and (6) loss of certain rights regarding board of directors membership.[102]

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[95] In addition, BTNA has asked the Commission for expedited treatment for the first two categories of resale. We note that, pursuant to the terms of the Investment Agreement, BT and MCI may each obtain licenses in the other's designated territories to take advantage of the passive and remote sales opportunities. *See* note 103, *infra*. BT, however, does not seek expedited treatment for the resale of private lines for switched services, which raises greater anticompetitive concerns than the other resale requests and would require an equivalency determination pursuant to the *International Resale Order*. *See* BT North America, Inc. Application for Authority under Section 214 of the Act to Provide International Resale Services as a Nondominant Common Carrier, File No. I-T-C-93-126. We also note that, pursuant to the Complaint and Final Judgment filed by the Department of Justice in connection with this transaction, neither MCI nor NEWCO will be able to lease international facilities or services to BT, or any of its affiliates or subsidiaries, for its provision of international simple resale (ISR) until certain specified conditions are satisfied. The Final Judgment defines ISR as the transmission through private or leased international telecommunications facilities (...) of voice or data traffic, if that traffic is carried over the public switched telecommunications network in both the country where the traffic originates and the country where it terminates.

[96] *See* 1992 Section 43.61 International Telecommunications Data Report, prepared by Industry Analysis Division, Common Carrier Bureau. For example, Cable & Wireless, Inc., MFS, Litel Communications, Inc. (LCI), and LDDS are all international resellers authorized to provide service between the United States and the United Kingdom.

[97] We also note that, with respect to U.K. - U.S. services, the three leading U.S. facilities-based carriers all offer country direct services. These services provide U.S. consumers with the benefits of a competitively-priced U.S. telecommunications services market. MCI has represented that the territorial allocation provision of the Agreement does not extend to the provision of MCI's country-direct service (CALL USA), and thus, MCI is permitted to continue to provide this service after consummation of the transaction . *S ee Letter from Donald F. Evans, Director, Regulatory Affairs, MCI Communications Corporation to William F. Caton, Acting Secretary, Federal Communications Commission (dated May 12, 1994)*. In addition, in order to pursue its ability to provide passive or remote sales outside of the United States, MCI presumably has the same opportunity as BT in the United States to pursue resale licenses in foreign countries.

[98] For example, WorldPartners, a non-equity alliance among several major telecommunications carriers around the world, including AT&T, and most recently, Unisource, is already offering WorldSource services, "global seamless services", to approximately a dozen countries. We note that the Department of Justice's Competitive Impact Statement (CIS) filed in the *MCI* case recognizes that "|s|eamless global telecommunications services represent an emerging market, but an important one for the evolution of international telecommunications". CIS at p. 15. In addition to BT and MCI, the CIS lists the following as entrants or potential entrants in this market: AT&T's WorldSource, Unisource (an alliance of the national or principal telecommunications providers in Switzerland, Sweden and the Netherlands), and Cable & Wireless. *Id*. The CIS also references Eunetcom (the alliance of the French and German national telecommunications providers) and Sprint, which have just recently announced their intent to form an alliance to provide similar global seamless telecommunications services.

[99] *See* note 98, *supra*.

[100] For example, MCI entered into a non-equity alliance with Stentor in Canada, and has announced its intention to form a joint venture with Grupo Financiero Banamex-Accival (Banacci) to become a licensed telecommunications operator in Mexico.

[101] Agreement at Article 9.12(a).

[102] *See* ¶ ¶13 -18, *supra*.

53. Finally, while the Agreement prohibits BT and MCI from direct solicitation of customers outside of their respective territories, there is no prohibition on the actual provision of services to those customers. Therefore, under the terms of the Agreement, each party may engage in passive and remote sales in each other's territories, allowing for, at least, indirect competition at the specific behest of the customer.[103]

54. In sum, the territorial allocation provision embodied in the Investment Agreement is not absolute, and appears to allow limited indirect competition between the parties in each other's designated territories through passive and remote sales. Moreover, we cannot discern any significant direct anticompetitive effect flowing from the territorial allocation provision in any market in which the parties would potentially compete in the absence of the restraint. We therefore conclude that the territorial allocation has little competitive significance for our overall consideration of the transaction.

c. Procompetitive Benefits

55. BT and MCI argue that the terms and conditions of the alliance are wholly procompetitive, and that any restraints on competition being only those necessary and ancillary to accomplishing the procompetitive objectives of the venture. As a threshold matter, MCI maintains that BT's $4.3 billion investment in MCI will strengthen MCI's financial resources and better enable it to compete globally. MCI also states that it will use this new equity to expand and improve the network services it offers to the American public. While this argument has some logic, we question whether access to BT's capital may be properly characterized as an efficiency flowing from the transaction that is relevant to a competitive analysis, in contrast to operating efficiencies, such as production or plant economies, or distribution-related efficiencies.

56. It appears, however, that the creation of NEWCO and BT's contribution to NEWCO of, *inter alia*, its intellectual property rights relating to enhanced services may result in legitimate procompetitive effects.[104] In addition, the joint venture should offer a number of efficiencies, such as greater economies of scale, easier entry into new markets and the sharing of risks. We believe that significant consumer benefits may result both from the formation of the joint venture and from the introduction of its newly developed products into the marketplace, in particular product offerings responsive to the needs of large scale, high-end users, such as multinational corporations. In sum, given that procompetitive benefits will likely flow from this transaction, that leveraging concerns are addressed by MCI's own undertakings and the imposition of certain reporting requirements, and that the territorial allocation provision will likely be of little competitive significance, we conclude that the overall transaction is in the public interest.

V. CONCLUSION

57. On balance, we conclude that the public interest will be served by the grant of this declaratory ruling when accompanied by MCI's commitments and the reporting requirements. We find that the voting and consent rights conferred upon BT in the Agreement do not constitute a transfer of control, but rather represent a minority shareholder's attempt to protect its substantial investment. Although BT may acquire a certain degree of influence in MCI's corporate decision-making process, we conclude that this influence would not rise to a level that constitutes control under Section 310(d). Furthermore, we find that BT's infusion of $4.3 billion into MCI will serve the public interest by allowing MCI to expand and improve its network services and product offerings and to expand the range of communications services it offers to the American public. This will not only bring U.S. consumers increased access to new and existing telecommunications services and lower prices, which will help stimulate economic growth, but will also create additional employment opportunities for U.S. citizens. Therefore, we conclude that the public interest would be disserved by disallowing the 3 percent non-BT alien ownership beyond the Section 310(b)(4) statutory benchmark.

58. We also recognize and share the concerns raised in the record regarding the incentives and opportunities created by the alliance of BT and MCI for either carrier, or both, to discriminate against competing U.S. carriers. Nonetheless, we are satisfied that MCI's specific commitments to accept no special concessions and to maintain certain provisioning and maintenance records combined with the reporting requirements imposed by this Order adequately safeguard against the potential for such discrimination, particularly in light of the evolving U.K. regulatory framework and relative openness of the U.K. telecommunications market. Finally, we conclude that there are significant procompetitive benefits that flow from this alliance. Moreover, the territorial allocation provision included in the parties' agreement appears to be of little direct competitive significance to our overall consideration of this transaction. We note that this Order is subject to possible future modification based upon the outcome of any relevant proceeding or proceedings 8of general applicability.

VI. ORDERING CLAUSES

59. Accordingly, IT IS ORDERED that the petitioners' request for a declaratory ruling IS GRANTED. Prior approval pursuant to Section 310(d) of the Act is not required before the BT investment in MCI can take place

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[103] "Customers may choose to purchase NEWCO services from both BT and MCI or to aggregate their worldwide purchases from a single distributor. Where a customer chooses to deal with both distributors, out of territory' sales of NEWCO services are generally referred to by the parties as Remote Sales. Even where the customer's worldwide purchases have been aggregated with one distributor or, with the customer's knowledge, NEWCO has prepared a worldwide sales plan for the customer and assigned a lead distributor for the account, the customer retains the ability to solicit NEWCO services from the other distributor on a case-by-case basis. Such sales are generally referred to by the parties as Passive Sales." *See* Letter from Donald F. Evans, Director of Regulatory Affairs, MCI Communications Corporation to William F. Caton, Acting Secretary, Federal Communications Commission (dated May 12, 1994).

[104] *See* EC Notification at note 58, *supra*.

because the transaction does not involve a transfer of control. Furthermore, the level of 28% foreign ownership in MCI, as described, is not inconsistent with the public interest under Section 310(b)(4) of the Act.

60. IT IS FURTHER ORDERED that MCI shall obtain prior Commission approval with regard to any proposed change in BT's ownership or voting interest in MCI.

61. IT IS FURTHER ORDERED that MCI shall conduct periodic surveys of its public shareholders to ensure continuing compliance with the maximum level of foreign ownership in MCI found not to be inconsistent with the public interest pursuant to Section 310(b)(4) of the Act.

62. IT IS FURTHER ORDERED that any and all amendments or modifications to the Investment Agreement shall be filed with the Commission within 30 days of execution.

63. IT IS FURTHER ORDERED that MCI shall comply with its commitment to file with the Commission within 5 days of the release of this Order an application to amend all of MCI's existing Section 214 certificates stating that MCI shall not accept special concessions, directly or indirectly, from any foreign carrier or administration with respect to traffic or settlement revenue flows between the United States and any foreign country served.

64. IT IS FURTHER ORDERED that MCI shall comply with its commitment to (i) maintain complete records on the provisioning and maintenance of network facilities and services it procures from BT, including but not limited to those it procures on behalf of customers of NEWCO offerings and (ii) make those records available to the Commission upon request.

65. IT IS FURTHER ORDERED that, pursuant to our authority under Section 218 of the Act, MCI shall continue to file its monthly circuit status reports for U.S.- U.K. circuits and shall make such reports publicly available on a quarterly basis.

66. IT IS FURTHER ORDERED that, pursuant to our authority under Section 218 of the Act, MCI shall file with the Common Carrier Bureau notification of each addition of circuits on the U.S. - U.K. route, specifying the joint owner.

67. IT IS FURTHER ORDERED that, pursuant to our authority under Section 218 of the Act, MCI shall file quarterly reports of revenue, number of messages and number of minutes of both originating and terminating traffic for the U.S.- U.K. route within 90 days from the end of each calendar quarter.

68. IT IS FURTHER ORDERED that, pursuant to our authority under Section 218 of the Act, MCI shall file with the Common Carrier Bureau, within 30 days of adoption of this order, a circuit status report on the U.S. - U.K. route, specifying the number of circuits and identifying the joint owners.

69. IT IS FURTHER ORDERED that MCI, pursuant to its commitment to accept no special concessions directly or indirectly from BT, shall obtain a written commitment from BT not to offer or provide any special concessions to NEWCO, relating to the provision of basic services. A copy of such written agreement shall be filed with this Commission fifteen days prior to consummation of this transaction.

70. IT IS FURTHER ORDERED that, pursuant to our authority under Section 218 of the Act, MCI shall file with the Common Carrier Bureau copies of all contracts, agreements, and arrangements with BT that relate to the routing of traffic and settlement of accounts on the U.S. - U.K. route.

71. IT IS FURTHER ORDERED that all references to MCI, BT and NEWCO in this Order shall also refer to their respective officers, directors and employees, as well as to any affiliated companies, and their officers, directors and employees.

72. IT IS FURTHER ORDERED that MCI shall file with the Secretary, Federal Communications Commission, Washington, D.C. 20554 within thirty days (30) of release of this Order or prior to the consummation of this transaction, whichever is the sooner, a letter accepting the terms and conditions of this Commission ruling.

73. IT IS FURTHER ORDERED that this Order is subject to further modification based upon the outcome of any relevant proceeding or proceedings of general applicability.

74. This order is effective upon release. Petitions for reconsideration under Section 1.106 may be filed within 30 days of the date of the public notice of this Order. (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Separate Statement

of

Commissioner James H. Quello

Re: MCI Communications Corporation and British Telecommunications Joint Petition for Declaratory Ruling Concerning Sections 310(b)(4) and 310(d) of the Communications Act

The joint petition by MCI Communications Corporation (MCI) and British Telecommunications (BT) for declaratory ruling is the latest in a series of proposed alliances between domestic and foreign communications providers to come before this Commission. Such alliances are increasing in frequency and scale as providers jockey for position in the global marketplace. The competitive positions of the parties in their respective domestic markets and the amount of financial investment at stake raised concerns regarding the potential for anti-competitive behavior.

This warranted close scrutiny of control and foreign ownership under the Section 310 of the Communications Act. I am satisfied that the MCI/BT liaison, as a whole, is in the public interest. The reporting requirements we herein impose, existing Commission regulation, and commitments made by MCI allay concerns about leveraging market power in a discriminatory fashion.

Principally, I support this Declaratory Ruling and Order because of the practical effects of the proposed alliance. The infusion of 4.3 billion dollars by British Telecom into MCI will benefit American consumers directly. MCI will have the financial resources necessary to expand and upgrade its network. This will "jump start" the information superhighway by spurring competitors to upgrade their networks.

A critical factor in my decision to issue the declaratory ruling is the relative openness of the communications market in the U.K. I will continue to scrutinize carefully subsequent proposed alliances for equivalent market situations. The marketplace in the United States is becoming increasingly and fiercely competitive. Open entry is the standard toward which we should strive, both domestically and internationally. Foreign entities should not be allowed to compete in our market if our domestic providers are precluded from theirs. I intend to continue to apply this basic principle in assessing the on-going reformulation of the global communications marketplace.

Other countries should demonstrate their commitment to fostering competition by implementing a conducive regulatory regime. Their providers will receive the regulatory treatment accorded ours.

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

In Re: Request of MCI Corporation British Telecommunications plc Joint Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, Declaratory Ruling and Order.

This Declaratory Ruling and Order permits British Telecommunications plc (BT) to commit a total of $4.3 billion in equity to MCI. The Order also finds that (1) BT's acquisition of certain voting and consent rights does not constitute a transfer of control of MCI to BT; (2) no public interest reason should prohibit BT's acquisition of 20 percent of MCI's capital stock; (3) comparable access to the U.K. market for U.S. carriers should not be used as a prerequisite to approving BT's acquisition of a non-controlling 20 percent interest in MCI;[1] and (4) MCI has made several commitments that adequately address the antitrust and leveraging issues concerning the potential for MCI to gain an unfair competitive advantage over competing U.S. carriers by virtue of its relationship with BT.

I write separately to emphasize that the Commission's decision regarding this venture raises several important issues regarding long-distance and international competition. First, this venture will establish an important precedent for other ventures involving interexchange and international carriers in the future.

Second, the specific terms of the BT/MCI venture prompt potential competition concerns. I am particularly interested in the analysis of the agreements that may amount to a territorial allocation between BT and MCI. In this instance, the Commission has determined that the allocation will not cause anticompetitive consequences in the relevant markets for (1) U.S. domestic telecommunications services, (2) international telecommunications services between the United States and United Kingdom, and (3) in the provision of seamless, global service to high-end customers. With respect to the analysis of these relevant markets, it is important to make a couple of observations. First, the Commission's conclusions regarding the BT/MCI venture are based, in part, on the relatively large number of carriers competing in the U.S. interexchange markets, as well as the large number of international facilities-based carriers and international resellers providing U.S.-U.K. telecommunications services.[2]

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[1] The Commission also waives for good cause the 25% foreign ownership limit to accomodate this BT investment in the event of minor fluctuations in valuation. The waiver also accommodates an additional 5 percent investment by other foreign entities.

[2] In a related development that will increase competition with the BT/MCI venture, the U.K. recently opened its telecommunication market to greater competition by awarding licenses to AT&T and a number of other companies for operating long-distance services anywhere in the country. See "AT&T Wins a License in Britain: Competition Widens for Global Services", The New York Times, July 9, 1994, at p. 37.

To the extent that the BT/MCI venture involves agreements by the participants not to compete within their respective territories, I emphasize the need to monitor the efficacy of the safeguards imposed in this decision, as well as those measures imposed by the Justice Department.[3] Second, the creation of the "NEWCO" is designed to provide enhanced services in a global market that currently lacks a significant number of competitors.

[3] See U.S. v. MCI Communications Corp. and BT Forty-Eight Co. (NEWCO), Case No. 1: 94CV01317 (D.D.C. filed June 15, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

WHYY, Inc. File No. BRED-910401ZW

For Renewal of License of
Station WHYY(FM)
Philadelphia, Pennsylvania

Infinity Broadcasting Corp. of Pennsylvania File No. BRH-910401F2

For Renewal of License of
Station WYSP(FM)
Philadelphia, Pennsylvania

Malrite Guaranteed Broadcast Partners, L.P. File No. BRH-910328YY

For Renewal of License of
Station WEGX(FM)[1]
Philadelphia, Pennsylvania

MEMORANDUM OPINION AND ORDER

Adopted: July 29, 1994; Released: August 1, 1994

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (i) the license renewal applications for the captioned radio stations; (ii) Petitions to Deny timely filed jointly by the Philadelphia Lesbian and Gay Task Force, the Pennsylvania and Philadelphia chapters of the National Organization for Women (NOW) (collectively PLGTF), and ASPIRA, Inc. of Pennsylvania against the renewal applications;[2] (iii) oppositions from the licensees; (iv) informal objectors' responses to the licensee's oppositions, and (v) the licensees' responses to staff letters of inquiry. Petitions filed by PLGTF (and the PLGTF with ASPIRA) allege that the above stations violated the Commission's equal employment opportunity (EEO) Rule and policies toward minorities. PLGTF also alleges that Stations WEGX(FM) and WYSP(FM) violated the EEO Rule and policies regarding their recruitment of women.[3] Accordingly, all the informal objectors request that the Commission conduct an investigation of the stations' employment practices pursuant to *Bilingual Bicultural Coalition on Mass Media v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*), designate the renewal applications for hearing and, thereafter, deny the applications. The licensees contend that they complied with the EEO Rule and deserve unconditional renewal.

2. This Memorandum Opinion and Order replaces an earlier version, FCC 94-186, which we hereby rescind pursuant to 47 C.F.R. § 1.108. The earlier version was adopted by the Commission on July 11, 1994, but not released.

II. PLEADINGS

3. *STANDING.* In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show... that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Section 309(d)(1); *Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

4. We note that the PLGTF and ASPIRA have failed to demonstrate party in interest status by filing affidavits from parties who are shown to be residents in the listening area of the above-listed stations or listeners to the stations. *See Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89, 98-99 (1980). Accordingly, we will treat these groups as informal objectors. 47 C.F.R. Section 73.3587; *see also KDEN Broadcasting Co.*, 55 Rad. Reg. 2d (P&F) 1311, 1311-1312 (1984).

III. DISCUSSION

5. *PRIMA FACIE CASE.* The PLGTF and ASPIRA derived their factual allegations from the licensees' EEO programs and annual employment reports. Review of the allegations against the licensees in this *Order* led us to conclude that they presented a prima facie case demonstrating that unconditional grant of the renewal applica-

[1] Station WEGX(FM) changed its call sign to WJJZ(FM) on March 22, 1993.

[2] The PLGTF challenged the renewal applications of six radio stations, including WIP(AM), in Philadelphia, Pennsylvania, on equal employment opportunity (EEO) grounds. The renewal application of WIP(AM) was addressed in a separate action. *See Spectacor Broadcasting L.P.*, 9 FCC Rcd 1729 (1993) (*Spectacor*). This *Order* addresses three of the remaining five stations. The other two stations will be addressed in a separate action. ASPIRA joined the PLGTF in the challenge of WIP(AM), WHYY(FM), and WYSP(FM). In a separate petition to deny challenging the renewal applications of 13 Philadelphia radio stations, the PLGTF and other parties also challenged the renewals of the three stations in this *Order* on programming issues. These issues were resolved in *License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania*, 8 FCC Rcd 6400 (1993).

[3] The licensee of WHYY(FM) was not challenged regarding its recruitment of women. Nonetheless, as is our practice in all cases, we reviewed the licensee's EEO efforts in this respect. We found them to be sufficient.

tions would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act, 47 U.S.C. Section 309(d)(1). *Astroline, supra.* Further inquiry was, therefore, necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont); Bilingual, supra.* However, review of the entire record, including the licensees' responses to further inquiries, indicates that there are no substantial and material questions of fact warranting designation for hearing regarding their EEO efforts. In addition, we find no evidence of employment discrimination. Thus, grant of each application will serve the public interest. 47 U.S.C. Section 309(d)(2); *Astroline, supra.* However, we will grant renewal with appropriate remedies.

6. Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. See Sections 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080 (b) and (c).

7. When a renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When the licensee fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO) ; see also* 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters) *See e.g., Beaumont, supra; Bilingual, supra.* WHYY(FM)

8. A review of the licensee's 1991 EEO Program Report, opposition to the PLGTF/ASPIRA petition to deny and response to our inquiry reveals that the licensee had 13 overall, including 10 upper-level, full-time hiring opportunities from March 7, 1988, through July 8, 1991.[4] The licensee recruited for all of its vacancies and used 212 general recruitment sources and four female-specific sources. It used 85 of these sources for all openings, including the four women's organizations. The other 127 general sources were used for two to nine openings. They are summarized as follows: 54 schools and colleges; a union; the National Association of Broadcasters (NAB); National Society of Fundraising Executives (NSFRE) Newsletter; veterans, senior citizens, and handicapped organizations; several newspapers and magazines; Computer Learning Center; Corporation for Public Broadcasting (CPB) Employment Outreach Project; Jewish Employment Service; Public Radio News Directors Association Mailing List (100 licensees nationwide); National Public Radio (NPR); 29 radio and television stations; and others. WHYY(FM) interviewed minority referrals from these sources: *Philadelphia Inquirer* (15), NPR (five), employee referrals (five), *Current* (three), and one each from Computer Learning Center, NSFRE Newsletter, Temple University, WHYY Job Line, CPB outreach project, and *Broadcasting.*

9. The licensee used 110 minority sources, 22 of which were used for all 13 openings.[5] Of the others, one minority source was used once and all others were used for two to nine openings. None of the 110 minority sources referred any of the minority referrals/interviewees; however, the licensee's records are incomplete concerning the total number of minority referrals or applicants it received.

10. The licensee reported that it interviewed 34 minorities out of 123 total interviewees. Minorities were present in 11 of 13 pools, eight upper-level. Of the 13 hires, seven were minorities -- four Blacks, two Hispanics, and one Asian. Of 10 upper-level hires, five were minorities -- two Blacks, two Hispanics, and one Asian.[6]

11. The PLGTF/ASPIRA argue that the station failed to use minority schools or publications as recruitment sources.[7] They argue that the licensee's reliance on recruitment mass mailings is ineffective. They also argue that there were never more than three Blacks in upper-level jobs at any one time during the license term; minor-

[4] The license terms of all stations in this *Order* ended on July 31, 1991.

[5] These 22 sources are: Tri-State Black Media Coalition, Howard University, Latin American Community Center, United American Indians of the Delaware Valley, Philadelphia Association of Black Journalists, Congreso Centro de Trabajos, Chief Roy Crazy Horse, Chinese Cultural and Community Center, Urban League, Hispanic Community Center, Mayor's Spanish Speaking Council, Minority Business Development Agency, Asian American Journalists Association, National Association of Hispanic Journalists, NBMC, Honorable Angel Ortiz, Philadelphia Opportunities Industrialization Center (OIC), State Representative Ralph Acosta, Accion Comunal Latino Americana, Cheyney University, California Chicano News Media Association, and the National Association of Black Journalists (NABJ). In addition, 21 NABJ chapters in 17 states and Washington, D.C. were among the other 88 minority sources contacted.

[6] The labor force for all of the licensees in this *Order* is the Philadelphia, Pennsylvania Metropolitan Statistical Area (MSA), which is 42.7% female and 18.2% minority (15.4% Black, 1.7% Hispanic, 1.0% Asian-Pacific Islander, and 0.1% American Indian). The licensee's Annual Employment Report for 1985 indicates that the licensee employed 25 persons overall (24 upper-level) with two minorities (8.0%), both Blacks in upper-level positions (8.3%). In 1986, the licensee employed 26 persons overall (24 upper-level) with two Blacks (7.7%) in upper-level positions (8.3%). In 1987, the licensee employed 27 persons overall (25 upper-level) with two Blacks (7.4%) in upper-level positions (8.0%). In 1988, the licensee employed 34 persons overall (32 upper-level) with one Black (2.9%) upper-level (3.1%). In 1989, it employed 35 persons overall, including one Black (2.9%) and two Hispanics (5.7%). The upper-level staff of 32 employees included one Black (3.1%) and two Hispanics (6.3%). In 1990, the licensee employed 36 persons overall (34 upper-level) with three minorities, all Blacks (8.3%) in upper-level positions (8.8%). In 1991, the licensee employed 29 persons overall (27 upper-level), with three Blacks (10.4%), two in upper-level jobs (7.4%).

[7] We note that the PLGTF/ASPIRA allegation that the licensee failed to use certain minority sources is incorrect, as shown above.

ities never had "significant" positions during the term; minority employment declined over the course of the term; and the licensee has proposed no improvements in its EEO program.[8]

12. The licensee responded in its opposition that it has revised its large list of recruitment sources nine times over the three-year review period. Further, the licensee stated that it sent job notices for specific vacancies to its sources. WHYY(FM) also stated that it annually reaffirmed the participation of its regular recruitment contacts and sought their assistance in identifying additional sources. The licensee noted that CPB assists by supplying its EEO recruitment kit which includes nationwide recruitment source lists. The licensee asserted that when it reviews the list, it adds more sources from its local region.

13. The licensee asserted that its loss of one upper-level minority employee from 1990 to 1991 was due to a net reduction in staff of seven employees both overall and upper-level, resulting from layoffs in 1990. The licensee stated that it has sought to remedy its loss of any employees through intensified recruitment of minorities and further changes in its source list. The licensee reported that it hired two minorities out of its three full-time hires from January 1, 1991, through the end of the term and that its one promotion in this period went to a minority employee. In addition, the licensee's records reveal that the five minorities hired for upper-level jobs in the review period were hired for four reporter/producer positions and director of development, which appears to contradict PLGTF's argument that minorities were never employed in significant positions.

14. After reviewing the record of Station WHYY(FM), we find no substantial and material questions of fact sufficient to warrant a hearing. *See Astroline, supra.* The licensee engaged in recruitment for all openings and hired and employed minorities and women. Thus, we find no evidence to indicate discrimination. Moreover, we believe that its overall efforts were such that no sanction or remedy is warranted. In this regard, the licensee recruited using numerous minority-specific, female, and general sources for every opening, obtained minority applicants and interviewees in 85% of its overall pools and 80% of its upper-level pools, and hired minorities (seven of 13 hires overall, five of 10 upper-level). In addition, the licensee engaged in self-assessment, revising its source list nine times and using 216 general and 110 minority sources during the term. In light of all of the above, we believe unconditional renewal is warranted. WYSP(FM)

15. A review of the licensee's 1991 EEO Program Report, opposition to the PLGTF/ASPIRA petition to deny and responses to our inquiries reveals that the licensee had 22 overall, including 17 upper-level, full-time hiring opportunities from March 28, 1988, through March 28, 1991. The licensee recruited for 16 of its vacancies and used 21 general and 12 minority recruitment sources for various numbers of openings.[9] Its records on minority referrals are incomplete, but it reported 29 minority referrals from general sources as follows: 17 from the *Philadelphia Inquirer*, two from the Pennsylvania Job Center, one from Pierce Junior College, two walk-ins, one from a temporary employment service, and the remaining six referrals from unknown sources. It reported only one minority referral from a minority source, the Urban League. In addition, the licensee's records did not reflect how many women were referred by each source. The licensee's records indicated that minorities were present in 10 interview pools (five upper-level) and that it interviewed 30 minorities (6 upper-level) out of 143 total interviewees. Women were present in 16 interview pools (11 upper-level) and the licensee interviewed 82 women, including 22 for upper-level jobs. The licensee hired five minorities, all Blacks, including one for an upper-level position. It hired 10 women, six of whom were hired for upper-level positions.[10]

16. The PLGTF/ASPIRA argue that the licensee's recruitment of women was inadequate and criticize the licensee for failing to obtain any female referrals from women's organizations or WYSP(FM) employees during the renewal year. They allege that the licensee's employment of women declined in 1991 from the number em-

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[8] In addition, PLGTF argues that EEO compliance should be evaluated on the basis of full parity for minorities and women rather than the long-standing Commission standard of 50% of parity with their presence in the labor force; that labor force figures more recent than the 1980 Census should be applied to Philadelphia stations, and that the Commission should amend its EEO Rule to prohibit sexual orientation discrimination. The PLGTF raised these arguments in its petition against the renewal of Station WIP(AM), Philadelphia, Pennsylvania. All three arguments were either dismissed or found to be unpersuasive in *Spectacor, supra.* We see no reason to alter our decision.

[9] General sources included the Metropolitan Collegiate Center (used for 16 vacancies), Women in Transition (16), 11 schools and colleges (15), the *Philadelphia Inquirer* (15), *Philadelphia Gay News* (2), and *Au Courant* (2). Minority sources and number of vacancies for which they were contacted are as follows: the Urban League (16 vacancies), Mayor's Spanish Council (16), OIC (16), NAACP (16), NBMC (16), Tri-State Black Media Coalition (16), Conicillio (a council of Spanish-speaking organizations) (16), Cheyney University (15), Lincoln University (15), Philadelphia Community College (15), La Actualidid (14), and the *Philadelphia Tribune* (12).

[10] *See* note 6, *supra*, for the Philadelphia MSA labor force. All of the minorities reported on the licensee's annual employment reports during the license term were Black. The licensee's Annual Employment Report for 1985 indicates that the licensee employed 25 persons overall (20 upper-level) with three Blacks (11.5%), all of whom were in upper-level positions (15.0% of upper-level positions). The licensee employed 13 women (50.0%), seven (35.0%) in upper-level positions. In 1986, the licensee employed 30 persons overall (22 upper-level) with four Blacks (13.3%), three (13.6%) in upper-level positions. It employed 12 women (40.0%), five (22.7%) in upper-level positions. In 1987, the licensee employed 30 persons overall (23 upper-level), including four Blacks overall (13.3%) and three (13.0%) upper-level. It employed 12 women (40.0%), six (26.1%) in upper-level positions. In 1988, it employed 30 persons overall (22 upper-level), including four Blacks overall (13.3%) and three (13.6%) upper-level. It employed 13 women (43.3%) overall with seven (31.8%) in upper-level positions. In 1989, the licensee employed 31 persons overall (23 upper-level), with five Blacks (16.1%), three (13.0%) in upper-level positions. It employed 15 women (48.4%) with nine (39.1%) in upper-level positions. In 1990, it employed 28 persons overall (20 upper-level), with four Blacks (14.3%), including two (10.0%) upper-level. It employed 13 women (46.4%) with seven (35.0%) in upper-level positions. In 1991, the licensee employed 29 persons overall (22 upper-level), with six Blacks (20.7%), four (18.2%) in upper-level positions. It employed 13 women (44.8%) with seven (31.8%) in upper-level positions.

ployed in 1990, that employment of women part-time declined over time from 1988 to 1991, and that women were employed below parity in upper-level positions every year except 1990. Also, they criticize the licensee for failing to obtain minority referrals during the same time period from minority sources, station employees, or schools. They argue that, although the station employed Blacks overall and in upper-level positions above parity with the labor force in 1991, "still only three of the 14 top two jobs are held by African Americans" at the station.[11] Lastly, the PLGTF/ASPIRA argue that the licensee's recruitment record-keeping was inadequate, especially records of referrals. Consequently, the productivity of its sources was unknown.

17. Although WYSP(FM) did not list all of its female and minority referrals by recruitment source, it stated that it collected some of this information and assessed its efforts as well as the effectiveness of sources. It indicated that it contacted sources at various times to confirm whether they were able to refer applicants and asked its female and minority sources to recommend other sources likely to refer women and minorities.

18. Regarding its employment of women, the licensee noted that the number of women employees was the same in the 1990 and 1991 annual employment reports for both overall and upper-level positions but that the percentage decreased because the stations added two upper-level and one overall employee in 1991. Even then, in both years, according to WYSP(FM), women were employed overall above parity and above 50% of parity upper-level. The licensee acknowledged that the number of female part-time employees decreased after 1988. It stated that the 1988 employees worked on marketing research and after the licensee decided to switch to an outside market research company to do this work, it no longer had positions for these part-time employees.

19. Regarding the six upper-level positions for which it did not publicly recruit, the licensee stated that it either recruited a specific person for those jobs or created a job for an applicant that the station felt was especially qualified. It argued that the Commission will allow some use of these practices, and cited *South Carolina Renewals*, 5 FCC Rcd 1704, 1705 (1990) (concerning Stations WESC(AM)/WESC-FM, Greenville, South Carolina) (*WESC*). The licensee indicated that one of the six persons hired without recruitment was a woman. She was a walk-in hire. The other five hires were positions created for non-minority males without recruitment.

20. After reviewing the record of Station WYSP(FM), we find no substantial and material questions of fact sufficient to warrant a hearing. *See Astroline, supra*. The licensee engaged in minority and female recruitment and interviewed and hired minorities and women. Therefore, we find no evidence to indicate discrimination. Accordingly, renewal of the license is in the public interest. The licensee recruited using minority sources for most openings, obtained 30 minority applicants and interviewees, included minorities in almost half of its applicant/interview pools, hired five minorities of 22 hires, and employed minorities above 50% of parity both overall and upper-level every year of the license term. However, the licensee failed to recruit for six (35%) of its upper-level openings.[12] Accordingly, we will renew the license subject to reporting conditions.

WEGX(FM)

21. A review of the licensee's 1991 EEO Program Report, opposition to the PLGTF petition and responses to our inquiries reveals that the licensee had 53 overall, including 40 upper-level, full-time hiring opportunities from March 1988 through February 1991.[13] The licensee recruited for 47 vacancies but did not use any single, outside recruitment source for all 47 openings. The licensee used general sources for openings as follows: two women's organizations and a job service (41 vacancies), Philadelphia Urban Coalition (39), a career center (31), two business schools (31), *Philadelphia Inquirer* (21), Talent Agent (seven), and a source that the licensee could not identify (one). The licensee contended that it sought employee referrals for all openings. The licensee could not identify the sources of all minority referrals but reported minority referrals from the *Philadelphia Inquirer* (13) and the job service (three). It reported that it contacted minority sources as follows: Urban League (40 vacancies), four different NAACP branches (41 vacancies for each), Council of Spanish Speaking Organizations (41), a Black city council member and community leader (14), OIC (13), a newspaper specializing in serving the Black community -- the *Philadelphia Tribune* -- (nine openings), United American Indians (18), Burks Group Minority Recruitment (three), and NBMC (one). The licensee reported minority referrals from the Urban League (seven) and Burks Group (six).

22. The licensee's interview information indicated that it interviewed 48 minorities (44 Black, three Hispanic, one Asian) for a total of 24 overall positions; 35 minorities were interviewed for 17 upper-level positions. The Asian hire was the only interviewee for the opening for which he was hired. The licensee reported that it interviewed 391 women for 38 overall positions; 337 women were interviewed for 27 upper-level positions. Of the 53 hires, four were minorities (three Blacks and one Asian) and 25 were women. Of 40 upper-level hires, two were minorities (one Black and one Asian) and 14 were women.[14] The licensee

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[11] Although the PLGTF/ASPIRA do not explain how they define "top two jobs," it is assumed that they are referring to the top two job categories on the Annual Employment Report -- (1) officials and managers, and (2) professionals.

[12] WYSP(FM)'s reliance on *South Carolina Renewals, supra*, as justification for neglecting to recruit for six upper-level positions is misplaced. First, in that case the licensee reported only three hires and failed to recruit for one of those positions. The Commission stated, "We have determined that no administrative action or further inquiry is warranted in view of the limited number of hiring and promotional opportunities, the recruitment of minorities and the employment of minorities throughout the term." *South Carolina* at 1405. Second, we note that WYSP(FM) filled five of the positions prior to the Commission's March 1990 release of the *South Carolina* opinion. Hence, the licensee could not have relied on the decision in that order as a rationale for its recruitment and hiring activity. Thus, we remind the licensee to recruit for each hiring activity, particularly where, as here, five of the six non-recruited jobs were filled with non-minority males.

[13] The licensee acquired WEGX(FM) on March 5, 1987, through a voluntary assignment of license (BALH-861219HJ) from WTRK, Inc. to Malrite Guaranteed Broadcast Partners.

[14] *See* note 6, *supra*, for the Philadelphia MSA labor force. The licensee of WEGX(FM) filed its Annual Employment Report for 1987 almost immediately after it obtained the station. It in-

also reported that it offered full-time upper-level positions to two minority women, one in June 1990 and another in January 1991, but that both declined the offers.

23. The PLGTF made the following arguments: (1) the licensee contacted no minority colleges as referral sources; (2) the station made no efforts to recruit Hispanics and employed no Hispanics except in 1989; (3) the station's annual employment reports from 1984 through 1991 show a decline in the percentage of female and Black employees overall except for women in 1989; (4) the same reports show a decline in female and Black employment in upper-level positions, except for Blacks in 1991; (5) these downward trends continued after the licensee took over the station in 1987; (6) the licensee admits that it misclassified a non-minority employee as Hispanic and, therefore, all of its EEO records are in question; and (7) the licensee claims that two minority women declined offers of upper-level jobs but fails to identify them.

24. The licensee of WEGX(FM) admitted that it contacted only two schools during the license term, but argued that its sources included 12 minority sources. The licensee acknowledged that it has not employed Hispanics full-time but stated that it has recruited Hispanics. Citing *Letter to Howard B. Dolgoff*, 5 FCC Rcd 7695, 7696 (1990) (concerning Station WTHZ-FM, Tallahassee, Florida) (*WTHZ-FM*), it argued that the Commission does not consider 1.7% to be a statistically "significant" number and noted that 1980 census data show that Hispanics comprise only 1.7% of the station's job market. *See also Applications of Certain Television Stations Serving Communities in the State of California*, 6 FCC Rcd 2340, 2344 n.4 (1991) (*California*), and *Spectacor* at para. 12 n.7.[15]

25. The licensee argued that it has not seen a significant decline in female or minority employees and notes that minority employees have increased in number from 1987-91 overall and upper-level. It also noted that female employees are less than 1% below full parity with the labor force overall and above 50% of parity in upper-level positions. In addition, it stated that both of its promotions in the review period were for Black employees, one of whom was a woman. Regarding the misclassified employee, the licensee stated that he had a surname that appeared to be Hispanic and was so classified. When the licensee answered the Commission's inquiry, it discovered that the employee was actually not Hispanic and it said classifying him as such was incorrect and inadvertent. Furthermore, the licensee did not elaborate on its failure to identify the female minority applicants who were offered jobs, but stated that they declined due to monetary considerations.

26. WEGX(FM) stated that it has assessed its EEO efforts a number of times and has increased record-keeping starting in June 1988, requiring monthly EEO recruitment reports from department heads starting in 1989. It claimed it engaged in a "constant expansion" of recruitment sources from October 1988 through the end of the term.

27. After reviewing the record of Station WEGX(FM), we find no substantial and material questions of fact sufficient to warrant a hearing. *See Astroline, supra.* The licensee engaged in recruitment and hired and employed minorities and women. We find no evidence to indicate discrimination. Therefore, renewal of the license is in the public interest. The licensee recruited using minority sources for most openings, obtained 48 minority applicants and interviewees (including 35 applicant/interviewees for upper-level positions), included minorities in almost half of its applicant/interview pools, hired four minorities, and employed minorities above 50% of parity both overall and upper-level every year of the five-year license term (except one year upper-level). However, the licensee failed to recruit using minority sources for 12 openings (22%) which is significant given the absence of minorities in more than half of the applicant and interview pools. Accordingly, we will renew the license subject to reporting conditions.

V. CONCLUSION

28. After considering the information before us, we find that hearings are not warranted and the records of the licensees support grant of their renewal applications. The license of WHYY(FM) will be renewed without sanction. In addition, the licenses of WYSP(FM) and WEGX(FM) will be renewed subject to reporting conditions.

VI. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED that, pursuant to 47 C.F.R. § 1.108, the Memorandum Opinion and Order adopted by the Commission on July 11, 1994, FCC 94-186, IS RESCINDED.

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dicates that the licensee employed 23 persons overall (18 upper-level) with three (13.0%) Blacks, two of whom were in upper-level positions (11.1%). It employed 12 (52.2%) women overall with seven (38.9%) in upper-level positions. In 1988, the licensee employed 35 persons overall (25 upper-level) with five (14.3%) Blacks, three (12.0%) in upper-level positions. It employed 18 (51.4%) women, nine (36.0%) in upper-level positions. In 1989, the licensee employed 40 persons (28 upper-level) with four (10.0%) Blacks, two (7.1%) in upper-level positions. It employed 23 (57.5%) women, 13 (46.4%) in upper-level positions. In 1990, the licensee employed 45 persons overall (29 upper-level) with six Blacks (13.3%) and one Asian (2.2%). Two Blacks (6.9%) and one Asian (3.4%) were in upper-level positions. It employed 22 (48.9%) women, nine (31.0%) in upper-level positions. In 1991, it employed 43 persons overall (29 upper-level) with five Blacks (11.6%) and one American Indian (2.3%). Three Blacks (10.4%) were in upper-level positions. The licensee employed 18 (41.9%) women, eight (27.6%) in upper-level positions.

[15] As the Commission stated in *Spectacor:*

> The Commission found in *WTHZ-FM* that minorities comprised 27.6% of the relevant labor force and that Hispanics comprised only 1.2%. The Commission stated that it considers a station's overall minority employment in determining EEO compliance but that it focuses principally on the dominant minority or non-dominant minorities that are present in significant numbers. *See WTHZ-FM* at 7696. In *California*, the Commission also stated that it evaluates EEO efforts toward all minorities but focuses primarily on the dominant minority and found that Hispanics were the dominant minority in job markets in which they comprised from 53% to 71% of minorities. *See California* at 2344 n.4.

Spectacor at para. 12 n.7.

We note that the PLGTF criticized all three licensees in this *Order* for employing few (or no) Hispanics, and for failing to recruit Hispanics adequately. We find this argument without merit for the reasons noted above.

30. IT IS FURTHER ORDERED that the informal objection filed by the Philadelphia Lesbian and Gay Task Force and NOW against the licensees of WHYY(FM), WYSP(FM), and WEGX(FM) IS DENIED.

31. IT IS FURTHER ORDERED that the informal objection filed by ASPIRA, Inc. of Pennsylvania, against the licensees of WHYY(FM) and WYSP(FM) IS DENIED.

32. IT IS FURTHER ORDERED that the license renewal application filed by WHYY, Inc., for Station WHYY(FM) IS GRANTED.

33. IT IS FURTHER ORDERED that the license renewal applications filed by Infinity Broadcasting Corporation of Pennsylvania for Station WYSP(FM) and by Malrite Guaranteed Broadcast Partners, L.P., for Station WEGX(FM) ARE GRANTED subject to the EEO reporting conditions specified herein.[16]

34. IT IS FURTHER ORDERED that the licensees of Stations WYSP(FM) and WEGX(FM) file an original and one copy of the following information on April 1, 1995, April 1, 1996, and April 1, 1997:

(a) For each report, please make two lists divided by full-time and part-time job vacancies during the twelve months preceding the respective reporting dates, indicating the job title, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[17]

(b) a list of employees as of the March 1, 1995, payroll period for the first report and as of the March 1, 1996, and the March 1, 1997, payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex and race or national origin;

(c) details concerning the station's efforts to recruit minorities for each position filled during the period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

35. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order to all parties.

36. The reports are to be filed with the Acting Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch at 202-632-7069.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[16] On May 23, 1994, the Commission staff granted an assignment of WEGX(FM) from Malrite Guaranteed Broadcast Partners, L.P., to Pyramid Communications WJJZ License Corporation (Pyramid) conditioned on the granting of WEGX(FM)'s license renewal application (File No. BALH-940111GE). Also granted the same day was an application assigning control of Pyramid from Pyramid West Associated Limited Partnership to Pyramid Finance Corporation (File No. BTCH-940111GL). Upon consummation of those assignment applications, reporting conditions will follow the license as a matter of law and pass automatically to the assignee. *See Woolfson Broadcasting, Inc.*, 4 FCC Rcd 6160 (1989).

[17] Such a list might start:

(1) News Director: Officials and Managers; Full-time.

3 Applicants:	1 White female	A.W.R.T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League and NAACP.

Selected: Black male (8/19/94).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-91

In the Matter of

Amendment of Section 73.202(b), RM-8498
Table of Allotments,
FM Broadcast Stations.
(Moapa Valley, Nevada)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 21, 1994; Released: August 9, 1994

Comment Date: September 29, 1994
Reply Comment Date: October 14, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Quinton W. Goode ("petitioner") requesting the allotment of Channel 284A to Moapa Valley, Nevada, as the community's first local FM service. Petitioner states that he will apply for the channel, if allotted.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 284A since it could provide the community with its first local aural broadcast service. Channel 284A can be allotted to Moapa Valley in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction, at coordinates 36-31-30 North Latitude and 114-24-56 West Longitude.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Moapa Valley, Nevada	--	284A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 29, 1994**, and reply comments on or before **October 14, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Quinton W. Goode
1400 S. Valley View, #2034
Las Vegas, Nevada 89102
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Although the petitioner's request was signed, Goode failed to include an affidavit verifying that the statements contained in his petition were accurate to the best of his knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.420(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919, n.41 (1990). The petitioner is requested to rectify this omission in his comments.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petitions for Waiver of Section 64.704(c) of the Commission's Rules — File No. ENF-92-06

ORDER

Adopted: August 1, 1994; Released: August 9, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In its *Report and Order* in CC Docket No. 91-35,[1] the Commission noted that payphones can be modified to permit selective 10XXX access[2] at an average cost of $105.00 per phone.[3] Finding this average cost reasonable, the Commission adopted Section 64.704(c) of its rules,[4] which originally required private payphone owners to unblock 10XXX dialing within six months of the effective date of the regulations, *i.e.*, by March 16, 1992. Subsequently, the Commission stayed that requirement pending its resolution of petitions for reconsideration of the unblocking requirement.[5] The *Reconsideration Order* reaffirmed the requirement that payphone owners unblock 10XXX access, setting January 10, 1993 as the date by which payphone owners were required to unblock 10XXX access.

2. During the interval between the release of the *Report and Order* on August 9, 1991, and the *Reconsideration Order* on July 10, 1992, 34 requests for waiver of the unblocking requirement were filed. The Common Carrier Bureau denied these requests in orders released January 8, 1993.[6] In response, Lincoln Telephone & Telegraph Company, a local exchange carrier, filed a petition for reconsideration of the order denying its waiver. Other parties -- Zenith Information Systems, Inc., Coin Call Plus and Denison Group Ltd. -- filed unopposed petitions for reconsideration and/or requests to supplement the record of their prior requests for a waiver of the unblocking requirement. For the reasons stated below, we grant the Lincoln petition and deny the remaining three petitions.

II. CONTENTIONS OF THE PARTIES

3. *The Lincoln petition.* Lincoln argues that the order denying its waiver request did not address the specific facts of its case. According to Lincoln, the Bureau order primarily focused on the cost of payphone instrument conversion. Lincoln's problem, however, stemmed from its having 80 pay telephones located in rural areas of its southeastern Nebraska service area that cannot be unblocked without upgrading its switches' software at a cost of $2,017,000 or $31,250 per pay telephone or replacing or reprogramming its central office switches in the affected exchanges, at a total cost of approximately $2,500,000. Lincoln argues that its figures for the cost of conversion were adequate to support a waiver, because they represent actual cost estimates obtained from the pertinent vendors. Lincoln states that it will upgrade its switches by the end of 1995, thus making 10XXX-0+ dialing available. Until then, because Lincoln's digital switches can only process fifteen dialed digits, which is inadequate for 10XXX-0+ dialing, only unblocked 10XXX-0- dialing will be possible from Lincoln payphones.

4. Sprint Communications Company L.P. ("Sprint") opposes Lincoln's petition on several grounds. Sprint contends that the Bureau expressly noted that the individual cost of bringing Lincoln's payphones into compliance with Section 64.704(c) was a minimum of $31,250 per pay telephone.[7] According to Sprint, the Bureau found that none of the petitioners, including Lincoln, had adequately documented the excessive cost of unblocking its payphones.[8] Sprint disagrees with Lincoln's contention that its waiver petition differed from those of the other petitioners. Sprint argues that all of the waiver petitions alleged excessive cost and that the magnitude of any cost differences was found to be immaterial.[9] Sprint also notes that Lincoln's petition does not specify whether its cost estimate is based on simply modifying its current switching technology or of wholly replacing the current switching technology with full equal access technology. Finally, Sprint contends that the public interest would not be served by granting Lincoln's waiver request because a waiver would prevent consumers at the 80 Lincoln pay telephones from using calling plans offered by Sprint and other interexchange carriers, that depend on full 10XXX access.[10]

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[1] Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35, Report and Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 4736 (1991) (*Report and Order*); Order on Reconsideration, 7 FCC Rcd 4355 (1992) (*Reconsideration Order*).

[2] "Selective" 10XXX access allows consumers to use 10XXX dialing sequences, hhsuch as 10XXX-0+, that would result in billing to the caller or an authorized third party, but not 10XXX sequences, such as 10XXX-1+, that would result in billing to the originating phone. *See Report and Order*, 6 FCC Rcd at 4738 & n.19.

[3] *Id.* at 4740.

[4] 47 C.F.R. § 64.704(c).

[5] Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35, Order, 7 FCC Rcd 2146 (1992).

[6] Petitions for Waiver of Section 64.704(c) of the Commission's Rules, Order, 8 FCC Rcd 435 (Com. Car. Bur. 1993); Gaston Memorial Hospital Petition for Waiver of Section 64.704(c) of the Commission's Rules, Order, 8 FCC Rcd 431 (Com. Car. Bur. 1993).

[7] Sprint Opposition at 1.

[8] *Id.*

[9] *Id.* at 2.

[10] *Id.* at n.1.

5. *The Zenith, Coin Call Plus, and Denison petitions.* Zenith argues that "in [its] original [waiver] request, [it] overlooked submitting some items that [it] did not know would be required. These include depreciation, revenues, and audited financial statements." Zenith requests permission to submit this material and indicates that it is willing to "undertake the time and expense to unblock 10XXX, but would like to be granted a period of a one-year minimum in which to secure the financing to swap out equipment and to not drain its limited manpower." Coin Call Plus also requests "the ability to supply additional information." The information it wishes to submit includes "depreciation schedules, revenues, impact of converting, and financial condition." Denison's petition indicates that it wishes to submit substantially the same information as Coin Call Plus.

6. The Formal Complaints and Investigations Branch of the Bureau's Enforcement Division granted the parties' requests to file additional information.[11] The parties did not, however, submit any such information.

III. DISCUSSION AND CONCLUSIONS

7. Under Section 1.3 of the Commission's rules as interpreted in *WAIT Radio v. FCC*,[12] the Commission may waive a rule if "good cause" is shown for such relief and the particular facts presented in support of a waiver request demonstrate that strict compliance with the Commission's rules is inconsistent with the public interest.

8. In the case of Lincoln, the record here indicates that Lincoln will incur costs equal to or in excess of $2,017,000 or $31,250 per phone, to unblock its 80 central office-implemented pay telephones. As noted above, the Commission concluded in the *Report and Order* that the average cost of unblocking a payphone when only the individual telephone instrument has to be modified or replaced amounted to $105 per telephone. Moreover, Lincoln states that only 10XXX-0+ dialing would be unavailable under the requested waiver; 10XXX-0- dialing is currently available. Lincoln's emphasizes that it has no legal alternative to such costly conversion. Abandoning these pay telephone instruments is not an option because, according to Lincoln, Nebraska law requires Lincoln to maintain at least one pay telephone in each exchange.[13] Based on these facts, we conclude that Lincoln has demonstrated good cause for the requested waiver. Requiring Lincoln to comply with the 10XXX unblocking requirements would be inconsistent with the public interest, since it would compel Lincoln to incur excessive costs to upgrade its software or switches prior to the scheduled conversion or to eliminate most of its payphone service in areas where the need for such service is likely to be great. Therefore, we grant Lincoln a temporary waiver of our 10XXX unblocking requirement, until December 31, 1995. At the expiration of this waiver, Lincoln must have completed full 10XXX unblocking at all of its payphones.

9. In contrast to Lincoln, the other petitioners, Zenith, Coin Call Plus, and Denison, have presented no persuasive arguments or evidence to support their petitions. They have declined to file additional information when invited to do so, even though they had requested permission to supplement the record. Because these parties have offered no new information demonstrating that "good cause" exists for a waiver and that strict compliance with the unblocking requirement would be inconsistent with the public interest, we decline to reconsider our decision denying the Zenith, Coin Call Plus, and Denison petitions for reconsideration of the Bureau's original decision.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the petition for reconsideration of Lincoln IS GRANTED to the extent indicated in this order.

11. IT IS FURTHER ORDERED that the relief requested by Lincoln IS GRANTED to the extent that Lincoln is given a temporary waiver of Section 64.704(c) of the Commission's Rules until December 31, 1995.

12. IT IS FURTHER ORDERED that the petitions for reconsideration filed by Zenith, Coin Call Plus, and Denison ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief, Common Carrier Bureau

[11] Letters from Thomas D. Wyatt, Chief, Formal Complaints and Investigations hhBranch, Enforcement Division, Common Carrier Bureau, FCC, to Zenith, Coin 7Call Plus, and Denison (dated March 24, 1993).

[12] 47 C.F.R. § 1.3; 418 F.2d 1153, 1159 (D.C. Cir. 1969); *also* Northwest Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[13] Lincoln Petition for Reconsideration at 8 n.16 (citing 291 Neb. Rev. Stat. §2.06) ("In each municipality served by an exchange carrier where public convenience requires it, the exchange carrier shall supply at least one public pay station that will be available to the public on a 24-hour basis").

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-128

In the Matter of

Amendment of Section 73.202(b),	RM-6655
Table of Allotments,	RM-6996
FM Broadcast Stations.	
(Dublin and Marlin, Texas)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 3, 1994; Released: August 10, 1994

By the Chief, Policy and Rules Division:

1. The Commission has before it the petition for reconsideration filed by KRZI, Inc., licensee of Station KEYR(FM), Marlin, Texas ("KRZI"), challenging the *Memorandum Opinion and Order* ("*MO&O*") in this proceeding, 8 FCC Rcd 3914 (1993).[1] The *MO&O* rescinded the allotment of Channel 285C3 to Dublin and allotted Channel 225C3 instead as a first local service. The *MO&O* also rescinded the allotment of Channel 225C2 and the modification of the license of FM Station KEYR and substituted Channel 225A at Marlin. David J. Shepherd ("Shepherd"), applicant for Channel 285C3, Dublin, Texas, filed supporting comments. Shepherd and KRZI filed a joint request for expedited action in this proceeding.

2. *Background.* This proceeding began with the filing of a petition for rule making by KRZI, proposing the substitution of Channel 225C2 in lieu of Channel 225A at Marlin, and modification of the Station KRXX (now KEYR) license to specify operation on the higher class channel. In response to that petition, the Commission issued a *Notice of Proposed Rule Making*, 4 FCC Rcd 4826 (1989). Robert V. Barnes then timely filed a counterproposal requesting the allotment of Channel 225C3 at Dublin, Texas. A Commission engineering analysis revealed that in the alternative, Channel 285C3 could be allotted at Dublin, and although the allotment was unacceptable with respect to the licensed site of KEAN(FM), Abilene, Texas, Channel 286C1, the allotment was compatible with KEAN's construction permit for Channel 286C. Thus, the *R&O* was issued, granting the allotment of Channel 225C2 in lieu of Channel 225A at Marlin, Texas, and the allotment of Channel 285C3 at Dublin, Texas, conditioned on the grant of a license to cover the KEAN construction permit. Subsequently, the construction permit for Station KEAN was cancelled, and the station was downgraded from Channel 286C to Channel 286C1. Since the allotment of Channel 285C3 at Dublin was short spaced to the licensed operation of Station KEAN on Channel 286C1 at Abilene, we could not sustain the allotment of Channel 285C3 at Dublin.[2] Consequently, we substituted Channel 225C3 for Channel 285C3 at Dublin, rescinded the Marlin upgrade, and substituted Channel 225A for Channel 225C2 at Marlin at Station KEYR's licensed site. *See MO&O, supra.*

3. In its petition for reconsideration KRZI states that the Commission erred in reversing its action in the *R&O* on the grounds that there were no other channels available for allotment at either Dublin or Marlin. KRZI states that the Commission can allot Channel 225C2 to Marlin as KRZI originally requested, and allot Channel 226C3 to Dublin. KRZI notes that although Channel 226C3 conflicts with the site proposed by Hispanic Coalition, Inc. ("Coalition") for Channel 227C2 at Haltom City, Texas (File No. BPH-890921MS), this conflict is not an impediment since the petitions in this proceeding were filed before the effective date of Section 73.208(a)(3) of the Commission's Rules. Thus the petitions in this proceeding are subject to the former procedures for resolving conflicts between applications and proposed allotments.[3] KRZI contends that Coalition can amend its application to specify a nonconflicting site, since all the other Haltom City applicants have in fact proposed nonconflicting sites. As an alternative, KRZI requests the substitution of Channel 225C3 for Channel 225A at Marlin, if Channel 225C2 cannot be substituted at Marlin.

4. In his supporting comments, Shepherd states that there is a site available for Channel 226C3 at Dublin that is not short-spaced to the application of Hispanic Coalition, Inc.[4]

5. After careful consideration of KRZI's petition in this matter, we believe that the public interest would be served by granting KRZI's proposal to rescind the allotment of Channel 225C3 at Dublin and to allot Channel 226C3 instead. We also believe that it is in the public interest to allot Channel 225C2 to Marlin in lieu of Channel 225A and to modify the license of Station KEYR to specify operation on the higher class channel. Our engineering analysis confirms that the allotment of Channel 226C3 to Dublin at the site specified by Shepherd will provide Dublin with its first local transmission service and Marlin with its first wide area coverage channel. The use of this site will also obviate a short-spacing with Hispanic Coalition's application for Channel 227C2, Haltom City, Texas, which

[1] Public Notice of this petition for reconsideration was given on April 23, 1990. *See* Report No. 1815.

[2] Since no other channels were available for allotment at either Dublin or Marlin, we comparatively considered the two communities.

[3] Under our former procedure, any time during the pendency of an FM application, a rulemaking petition for a new FM allotment or an upgrade in the class of an existing FM allotment may be filed that conflicts with the transmitter site proposed in the FM application. Generally, a preference was given to the rulemaking petition over the application because we presumed that granting a new FM allotment or an upgrade in the class of an existing allotment serves the public interest, while protecting an applicant's preference for a specific transmitter site specified in an application serves only an applicant's private interest. *See, e.g.*, Andalusia, Alabama (Policy and Rules Div.), 49 FR 32201, published August 13, 1984; *First Report and Order* in Docket No. 14185, 40 FCC 662, 703 (1962)

[4] Shepherd notes that Channel 226C3 can be allotted to Dublin at North Latitude 32-15-21 and West Longitude 98-28-09 with a site restriction of 22.19 km NW.

was granted by an Initial Decision in Docket 91-100, 8 FCC Rcd 6344 (1993). Therefore, we will substitute Channel 226C3 for Channel 225C3 at Dublin with a site restriction of 22.4 kilometers (13.9 miles) northwest of Dublin.[5] We will also substitute Channel 225C2 for Channel 225A at Marlin at the site suggested by KRZI which is 26.8 kilometers (16.7 miles) west of Marlin.[6]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 26, 1994** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Dublin, Texas	226C3
Marlin, Texas	225C2

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the licensee of KRZI, Inc., for Station KEYR(FM), Marlin Texas, IS MODIFIED to specify operation on Channel 225C2 in lieu of Channel 225A, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS ORDERED, That the Petition for Reconsideration filed by KRZI, Inc. IS GRANTED.

9. IT IS FURTHER ORDERED, That Channel 226C3 is substituted for Channel 225C3 at Dublin, Texas, and Channel 225C2 is substituted for Channel 225A at Marlin, Texas.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this MEMORANDUM OPINION AND ORDER, to the following:

David J. Shepherd
3513 Brookline Lane
Dallas, Texas 75234

James A. Gammon, Esq.
Gammon & Grange
8280 Greensboro Drive
McLean, VA 22102-3807
(Counsel for Hispanic Coalition)

11. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink, Chief
Policy and Rules Division
Mass Media Bureau

[5] The reference coordinates for Channel 226C3 at Dublin are 32-15-21 and 98-28-09. As noted above, David J. Shepherd, the remaining applicant for Channel 225C3 in Dublin filed supporting comments in this proceeding. Therefore, he is on notice that our disposition of the petition for reconsideration will require that his application be amended. Shepherd will be served a copy of this *Memorandum Opinion and Order* and will be allowed to amend to specify the new channel without loss of cut-off protection.

[6] The reference coordinates for Channel 225C2 at Marlin are 31-22-48 and 97-09-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TPI COMMUNICATIONS INTERNATIONAL, INC.,

Complainant,

v.

PUERTO RICO TELEPHONE COMPANY,	File No. E-94-050
PUERTO RICO TELEPHONE AUTHORITY,	File No. E-94-051
PUERTO RICO COMMUNICATIONS CORPORATION,	File No. E-94-052
PUERTO RICO COMMUNICATIONS AUTHORITY,	File No. E-94-053
CELULARES TELEFONICA,	File No. E-94-054

Defendants.

ORDER

Adopted: August 3, 1994; Released: August 10, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On March 3, 1994, TPI Communications International, Inc. (TPI) filed the above-captioned complaints against Puerto Rico Telephone Company (PRTC), Puerto Rico Telephone Authority (PRTA), Puerto Rico Communications Corporation (PRCC), Puerto Rico Communications Authority (PRCA), and Celulares Telefonica (CT) (collectively the "defendants"). The complaints seek damages and injunctive relief for defendants' alleged failure to provide TPI reasonable interconnection within the meaning of Sections 201(b) and 202(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201(b) and 202(a). On May 19, 1994, counsel for PRTC and PRTA filed a motion to dismiss the complaints against PRTA, PRCC, PRCA, and CT. Counsel argues that none of the facts alleged by TPI involved actions taken by these four defendants and, therefore, TPI had failed to state a cause of action against them. Counsel also states that PRCA is no longer in existence and CT does not exist as separate legal entity but is a department within PRTC.

2. After due consideration of the defendants' unopposed motion, we dismiss TPI's complaints against PRTA, PRCC, PRCA, and CT.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the defendants' Motion to Dismiss IS GRANTED as far as it concerns Puerto Rico Telephone Authority, Puerto Rico Communications Corporation, Puerto Rico Communications Authority, and Celulares Telefonica.

4. IT IS FURTHER ORDERED that the above-captioned complaints involving Puerto Rico Telephone Authority, Puerto Rico Communications Corporation, Puerto Rico Communications Authority, and Celulares Telefonica ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW YORK STATE DEPARTMENT OF
SOCIAL SERVICES and

AT&T COMMUNICATIONS, INC.,
Complainants,

v. File No. E-90-159

NEW YORK
TELEPHONE COMPANY,
Defendant.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

ORDER

Adopted: August 3, 1994; Released: August 10, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On May 8, 1990, the New York State Department of Social Services ("NYSDSS") and AT&T Communications, Inc., file the above-captioned complaint against the New York Telephone Company. The complainants alleged that New York Telephone had charged more for its interstate special access services than the rates specified in its applicable interstate tariffs, in violation of Section 203 of the Communications Act, 47 U.S.C. § 203. New York Telephone denied the allegations.

2. On July 29, 1994, the complainants informed the Commission that they wish to "discontinue with prejudice" this proceeding.[1]

3. We are satisfied that dismissing the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the above-captioned complaint IS DISMISSED WITH PREJUDICE and that the proceeding IS TERMINATED.

[1] Letter from Richard H. Rubin, AT&T, to Thomas Wyatt, Chief, Formal Compls. and Inves. Branch, Enf. Div., Common Carrier Bur., FCC (July 29, 1994). The letter states that NYSDSS "concurs in this request."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MID-ATLANTIC CABLE SERVICE COMPANY

v. CSR-4240-P

HOME TEAM SPORTS AND COLUMBIA CABLE OF VIRGINIA

Exclusivity, Unfair Practices and Discrimination Program Access Complaint

ORDER

Adopted: July 27, 1994; Released: July 29, 1994

By the Chief, Cable Services Bureau:

1. On March 22, 1994, Mid-Atlantic Cable Service Company ("Mid-Atlantic") filed a Program Access Complaint (CSR-4240-P) against two defendants, Home Team Sports Limited Partnership ("HTS") and Columbia Associates, L.P., d/b/a Columbia Cable of Virginia ("Columbia"), alleging that HTS and Columbia failed to observe the requirements of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") and the Commission's Rules implemented under the 1992 Cable Act, by violating Sections 76.1001, 76.1002(a), 76.1002(b) and 76.1002(c) of the Commission's Rules. *See* 1992 Cable Act, Pub. L. No. 102-385, 106 Stat. 1460, 1494 (1992), 47 U.S.C. Section 548; 47 C.F.R. Sections 76.1001, 76.1002(a), 76.1002(b) and 76.1002(c).

2. The Complaint alleged that HTS refused to provide programming to Mid-Atlantic while entering into an exclusive programming agreement with Columbia, that HTS engaged in unfair methods of competition, that Columbia improperly influenced HTS to deny carriage to Mid-Atlantic, and that HTS engaged in *per se* discrimination against Mid-Atlantic.

3. Answers were originally due April 21, 1994, thirty days from the service date of the Complaint. On April 21, Columbia filed a Consent Request for Extension of Time, occasioned by the parties' efforts to determine whether the dispute could be privately resolved, and consented to by HTS and Mid-Atlantic. The Request sought an extension until May 23, 1994 (sixty days from the service date of the original complaint) for Columbia to file its Answer, and was orally granted by Competition Division staff.

4. HTS subsequently requested a further extension of time until May 23, 1994 in which to file its Answer, with the consent of Mid-Atlantic, and Competition Division staff orally granted this request as well.

5. On May 23, 1994 HTS and Columbia jointly filed a Consent Request for Further Extension of Time, consented to by Mid-Atlantic, setting June 6, 1994 as the date by which Answers were to be filed. This second extension request was also occasioned by the parties' continuing efforts to determine whether the dispute could be privately resolved, and was again granted orally by Competition Division staff.

6. On June 6, 1994 defendants again requested, and Competition Division staff again orally granted, an extension of time for Answers to be filed. This third extension gave defendants until June 20, 1994 to file Answers, again because settlement discussions were ongoing.

7. On June 24, 1994 Mid-Atlantic wrote the Commission requesting that its Complaint be dismissed, the parties having resolved their differences with respect to the matters complained of. The letter noted that Commission intervention with respect to this matter had become unnecessary.

8. On June 27, 1994 Mid-Atlantic again wrote the Commission, supplementing and clarifying its earlier June 24 letter to make it clear that Mid-Atlantic sought dismissal in the nature of a dismissal with prejudice, intending to foreclose the filing of any future action with respect to the facts complained of in the Complaint.

9. The 1992 Cable Act requires expeditious resolution of program access disputes. *See* 1992 Cable Act, Section 628(f)(1); 106 Stat. 1460, 1496; 47 U.S.C. Section 548. The Commission's policy is to encourage resolution of program access disputes through negotiations between the parties in an effort to avoid time-consuming, complex adjudication. Such a policy favoring private settlement and alternative dispute resolution conserves Commission resources and is thus in the public interest. *See* First Report and Order in MM Docket No. 92-265, at Paragraphs 74, 123, 124; 8 FCC Rcd 3359, 3389, 3416 (1993).

10. We thus find that it is in the public interest to terminate this proceeding pursuant to the settlement negotiated by the parties.

11. Accordingly, IT IS ORDERED, that the Complaint of Mid-Atlantic IS DISMISSED WITH PREJUDICE. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GC Docket No. 92-52

In the Matter of

Reexamination of the Policy	RM-7739
Statement on Comparative	RM-7740
Broadcast Hearings	RM-7741

ORDER

Adopted: August 1, 1994; Released: August 1, 1994

1. This order grants a Motion for Extension of Time, filed July 28, 1994, by Irene Rodriguez Diaz de McComas (McComas). McComas asks the Commission to extend until August 22, 1994, the date for reply comments in this proceeding.

2. On June 22, 1994, the Commission issued a second further notice of proposed rulemaking in this proceeding, which was initiated to reform the criteria used to select among mutually exclusive applicants for new broadcast facilities. *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 9 FCC Rcd 2821 (1994). The Commission asked for comment on the impact on this proceeding of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). The second further notice established a comment date of July 22, 1994, and a reply date of August 8, 1994. McComas requests that the deadline for filing reply comments in this proceeding be extended two weeks.

3. McComas asserts that technical difficulties with the Commission's automated docket retrieval system has made it impossible for her to obtain in a timely manner copies of the comments filed in this proceeding. Moreover, she notes that the reply date falls during the period in mid-August when many parties schedule summer vacations to coincide with the lull in Commission business that usually occurs at that time.

4. ACCORDINGLY, IT IS ORDERED, pursuant to the authority delegated under 47 C.F.R. § 0.251(b), that good cause having been shown, the Motion for Extension on Time, filed July 28, 1994, by Irene Rodriguez Diaz de McComas IS GRANTED.

5. IT IS FURTHER ORDERED, That the Reply Date in this proceeding IS EXTENDED to August 22, 1994.

FEDERAL COMMUNICATIONS COMMISSION

William E. Kennard
General Counsel

by John I. Riffer
Associate General Counsel

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AmericaTel Corporation	File No. I-T-C-93-160-TC
Application for Transfer of Control And *Pro Forma* Assignment of Section 214 Authorizations	

MEMORANDUM OPINION, ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 28, 1994; Released: July 11, 1994

By the Commission: Commissioner Quello concurring and issuing a statement.

Table of Contents

	Paragraph Number
I. Introduction	1
II. Background	2-5
III. Discussion	
A. Summary	6-7
B. Standing	8-10
C. Applicability of Comparable Market Access Standard	11-15
D. Telefonica's Potential Control of AmericaTel and ENTEL	16-21
E. Chile's Telecommunications Market and Regulatory Regime	
1. Overview and Uncontested Facts	22-24
2. Ability to Invest and Obtain Licenses	25-28
3. Effective Opportunities to Compete	29-39
F. Additional Public Interest Considerations and Determination Regarding Market Entry	40-42
G. Accounting Rates	43-49
H. Regulatory Treatment of Applicants	50-55
IV. Conclusion	56-57
V. Ordering Clauses	58-78

I. INTRODUCTION

1. On April 16, 1993, AmericaTel Corporation (AmericaTel) and ENTEL International B.V.I. Corporation (ENTEL) filed the above-captioned application (AmericaTel/ENTEL Application)[1] requesting authority to: (1) transfer control of AmericaTel from Northland Communications, Inc. (Northland) to ENTEL by increasing ENTEL's ownership stake in AmericaTel from 49 percent to 80 percent; and (2) assign on a *pro forma* basis AmericaTel's international Section 214 authorizations to AmericaTel Acquisition Corporation (ATA), of which ENTEL is the controlling shareholder. For the reasons stated in this Order, we grant this application subject to certain conditions and reporting requirements.

II. BACKGROUND

2. AmericaTel, a Delaware corporation, is authorized under Section 214 of the Communications Act to resell international switched voice services and to provide a range of facilities-based services as a nondominant carrier between the United States and various foreign countries.[2] AmericaTel to date has not commenced operations pursuant to its Section 214 authorizations.[3] Northland, a Florida corporation, owns 51 percent of AmericaTel's shares, and ENTEL, a corporation organized under the laws of the British Virgin Islands, owns 49 percent. AmericaTel has a five-member Board of Directors (Board). Three directors are appointed by Northland and two are appointed by ENTEL. The AmericaTel/ENTEL Application proposes that ENTEL assume control of AmericaTel by increasing its ownership interest in AmericaTel's stock to 80 percent.[4] After the transfer of control, AmericaTel's Board would still consist of five members, but Northland would select one Board member, and ENTEL would select four members.[5]

3. Immediately after ENTEL assumes control of AmericaTel, AmericaTel would assign its Section 214 authorizations to ATA, a Florida corporation owned 80 percent by ENTEL and 20 percent by Northland. Northland and ENTEL (Applicants) state that ATA does not intend to build any new facilities to implement the Section 214 authorizations that are assigned to it by AmericaTel. Applicants state ATA would have the same ownership and Board structure as AmericaTel: Northland would appoint one and ENTEL would appoint four of the five Board members. Applicants request that, once AmericaTel assigns its Section 214 authorizations to ATA, ATA be regulated as a nondominant international carrier for all authorized U.S. international routes and services.[6]

4. Northland is owned by Patrico E. Northland and Marco Northland, two U.S. citizens.[7] Eighty-five percent of the shares of ENTEL are owned by the Empresa Nacional de Telecomunicaciones S.A. (ENTEL-Chile) and 15

[1] AmericaTel and ENTEL filed their application pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. §214.

[2] *See AmericaTel Corporation*, 7 FCC Rcd 6610 (1992).

[3] *See* AmericaTel/ENTEL Application, at 14.

[4] To accomplish the transfer, AmericaTel would issue new shares of stock to ENTEL and Northland would sell its outstanding AmericaTel stock to ENTEL. *See* AmericaTel/ENTEL Application, at 3.

[5] *See* AmericaTel Ex Parte Filing of January 31, 1994, at 1.

[6] *See* AmericaTel/ENTEL Application, at 3, 7 and 16.

[7] *See id.*, at 3.

percent are owned by ENTEL Internacional S.A., both of which are Chilean corporations.[8] ENTEL-Chile provides domestic long distance and international telephone service in Chile.[9] Telefonica de Espana S.A. (Telefonica), which owns 20 percent of ENTEL-Chile, also owns a controlling 43 percent interest in the Compania de Telefonos de Chile (CTC). CTC provides local telephone service to approximately 95 percent of Chilean telephone subscribers.[10] Telefonica, which is Spain's government-controlled monopoly telephone company, also controls Telefonica Larga Distancia de Puerto Rico (TLD), a domestic long distance and international carrier serving Puerto Rico and the U.S. Virgin Islands.[11]

5. We placed the AmericaTel/ENTEL application on public notice. American Telephone and Telegraph (AT&T) filed a petition to deny, in response to which ENTEL and Northland filed oppositions. AT&T filed a reply to these oppositions. Subsequently, the Applicants and AT&T each filed supplemental pleadings. The Applicants also filed a series of Ex Parte statements between January and March 1994 detailing, among other things, changes in Chile's telecommunications markets, laws and regulations that took place between April 16, 1993, and March 10, 1994.[12] Finally, AT&T filed supplemental comments on April 1, 1994, to which Applicants responded.[13]

III. DISCUSSION

A. Summary

6. We first address AmericaTel's procedural argument that AT&T lacks standing to file its petition to deny. We then examine the substantive issues raised in this proceeding which include, broadly, the potential anticompetitive effects of the proposed transaction in the market for U.S. international and domestic telecommunications services.

7. We grant the AmericaTel/ENTEL Application because we believe that the balance of public interest considerations, including the application's effect on economic development in the United States and increasing access to foreign telecommunications markets for U.S. companies, supports the grant of this application. We find that Chile's markets for domestic long distance and international services are becoming more competitive and open to U.S. investment and participation. Further, Chile's recent initiatives to liberalize its telecommunication laws and regulations appear to be designed to promote competition and prevent the abuse of market power. We believe that the nondiscrimination safeguards provided by Chile's regulatory regime and the safeguards we impose in this order will be sufficient to protect U.S. carriers in their provision of U.S. international service to Chile. Nevertheless, we believe there remains the potential for discrimination by CTC in favor of ENTEL-Chile and/or ATA, and against unaffiliated U.S. carriers because of its common ownership with ENTEL-Chile through Telefonica. Given this potential, and the nascent stage of Chile's new regulatory regime for telecommunications, we grant this application subject to certain terms and conditions to protect U.S. carriers from abuse of any residual market power that CTC, ENTEL-Chile or any commonly-owned or -controlled carriers may retain.[14]

B. Standing

(a) Positions of the Parties

8. Applicants request that the Commission dismiss AT&T's petition to deny because, contrary to Section 63.52 of the Commission's rules, 47 C.F.R. Section' 63.52, AT&T has failed to state its interest in this proceeding.[15] In response AT&T argues that, because it is a U.S. common carrier authorized to offer international telecommunica-

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[8] ENTEL-Chile is a publicly-traded Chilean corporation. ENTEL Internacional S.A. is a wholly-owned subsidiary of ENTEL-Chile. The largest shareholders of ENTEL-Chile are Inversiones Hispano Chilenas, S.A. (a wholly-owned subsidiary of Telefonica de Espana S.A.), which owns 20 percent; Inversiones en Telecomunicaciones y Otras Ltda. (a Chase Manhattan Bank subsidiary), which owns 11.6 percent; Invercom Primera S.A., which owns 10 percent; Banco de Santander, which owns 10 percent; and various Chilean pension funds collectively hold approximately 29 percent of ENTEL-Chile's stock. *See* AmericaTel/ENTEL Application, at 4; *see also* ENTEL Opposition to Petition to Deny filed June 10, 1993, at Attachment C (ENTEL Opposition).

[9] Prior to May 1992, ENTEL-Chile provided nearly 100 percent of Chile's domestic and international long distance telephone service. *See* ENTEL Opposition at 11 and n.11. *See also* AT&T Supplemental Comments at 3, n.3.

[10] In February 1994, Telefonica announced that it intended to divest from either ENTEL-Chile or CTC in compliance with Resolution 368, issued by Chile's Anti-Monopoly Commission (AMC), and the Chilean Supreme Court order upholding the resolution. For a more detailed discussion of Telefonica's investments in CTC and ENTEL-Chile, *see infra* paras. 16-21. For a more detailed discussion of Resolution 368 *see also infra* note 35.

[11] *See Telefonica Larga Distancia de Puerto Rico*, 8 FCC Rcd 107 (1992), (*TLD*). Since we adopted *TLD*, Telefonica has acquired, in addition to the interests detailed at n.4 of that order, a 35 percent ownership interest in Telefonica de Peru. It has also invested in telecommunications companies in Colombia and Uruguay. *See Latin American Telecom Report*, at 3, March 15, 1994.

[12] Ex Partes were filed by the following parties on the specified dates: ENTEL, October 4, 1993; ENTEL, January 13, 1994; ENTEL, January 26, 1994; AmericaTel, January 31, 1994; ENTEL, January 31, 1994; ENTEL, February 7, 1994; AmericaTel, February 17, 1994; ENTEL, February 28, 1994; ENTEL, March 4, 1994; ENTEL, March 9, 1994; ENTEL, March 10, 1994; ENTEL, May, 9, 1994; ENTEL, May 31, 1994; ENTEL, June 27, 1994; *see also* AmericaTel Supplement to Request for Expedition, filed January, 31, 1994 (AmericaTel Expedition Supplement).

[13] ENTEL also updated its Section 1.65 statement. Letters of support for the application were filed by the Beacon Council, Hughes Satellite and the Chilean Embassy. In the interests of fairness and for purposes of compiling a complete record, we grant ENTEL's and Northland's motions for leave to file supplemental responses, and AT&T's motion for leave to file a supplemental reply. We also accept AT&T's supplemental comments, and the responsive filings submitted by ENTEL and Northland. We find that AT&T's supplemental comments, although filed after the pleading cycle ended, addressed recent changes in Chilean law that are directly relevant to the issues raised by the AmericaTel/ENTEL Application.

[14] Each subsequent Section 214 application filed by ATA or AmericaTel shall be evaluated on a case-by-case basis.

[15] ENTEL Opposition at 6-7.

tions services, it has an interest in any Commission action granting authority to a foreign carrier to enter U.S. telecommunications markets.[16]

(b) Discussion

9. We find that AT&T has standing under Section 63.52(c) of the Commission's rules and accordingly deny ENTEL's request for dismissal of AT&T's Petition to Deny. Under the standard established in *Sierra Club v. Morton*,[17] a party seeking standing must allege facts sufficient to demonstrate that grant of the subject application would cause the petitioner to suffer a direct injury.[18] Specifically, a party filing a petition to deny must allege facts that demonstrate not only a direct or threatened injury to the petitioner from the subject action, but also a casual link "between the claimed injury and the challenged action."[19] Petitioner must demonstrate the causal link by establishing that: (1) "these injuries fairly can be traced to the challenged action;"[20] and (2) "the injury would be prevented or redressed by the relief requested."[21]

10. We find that, as a potential competitor of AmericaTel/ATA alleging potential economic injury, AT&T has standing to petition to deny the AmericaTel/ENTEL Application. AT&T alleges that if this application is granted without certain conditions being met, ENTEL and Telefonica will be able to market end-to-end telecommunications services between the United States and their home markets. AT&T argues that, unless these foreign markets afford comparable access to U.S. carriers, ENTEL and Telefonica will gain an unfair competitive advantage over U.S. carriers in the global market for telecommunications services.[22] We find that AT&T, a U.S. international carrier, has shown that the potential for economic injury "fairly can be traced" to grant of the AmericaTel/ENTEL Application.[23] We also find that grant of the relief that AT&T requests in its petition would potentially redress this alleged injury. Therefore, we conclude that AT&T has standing as an interested party in this proceeding.

C. Applicability of Comparable Market Access Standard

(1) Positions of the Parties

11. AT&T argues in its petition to deny that the Commission should not permit ENTEL to initiate service in the United States unless and until we determine through receipt of further public comment that comparable market access for U.S. firms is available in Chile. AT&T also argues that to the extent the Commission determines that Telefonica influences or controls ENTEL, we should deny the pending application unless and until we determine that comparable market access is available to U.S. firms in Spain, Telefonica's home market. In supplemental comments filed April 1, 1994, AT&T concludes that under present market conditions, effective competition for domestic and international long distance service in Chile could take hold after key provisions of a recently enacted telecommunications law (Law 3-A) are fully implemented. As a result, AT&T states that it would support a finding, subject to certain conditions, that after Chile has implemented the new statute, actual market opportunities in Chile's long distance market for U.S. firms will, within a reasonable time, become comparable to those available today in the U.S. long distance market. AT&T, in addition, requests that we condition grant of the AmericaTel/ENTEL Application on Chile's continued provision of comparable market access opportunities to U.S. firms. In its supplemental comments, AT&T focuses only on Chile, noting that Telefonica has publicly declared it will divest its holdings in either ENTEL-Chile or CTC by October 1994. AT&T requests, however, that any authorization granted in this case be subject to Telefonica's timely divestiture.

12. In response, Applicants argue that Commission precedent does not require conditioning grant of this application on a comparable market assessment and that we should not impose such a condition in this case.[24] Furthermore, Applicants argue that Spain's market is not relevant because Telefonica will have "no direct interest in, and absolutely no control" over ATA.[25] Finally, Applicants concede that although conditions in Chile's market might be relevant, Chile "has the most open market of any country in Latin America, and even exceeds that of the U.S. in certain respects...."[26]

(2) Discussion

13. We have not, to date, adopted a policy requiring comparable market access as a condition of entry into the U.S. telecommunications market by foreign carriers, although AT&T has filed a petition for rulemaking asking us to adopt a comparable market access standard.[27] Accordingly, our action on the AmericaTel/ENTEL Application is properly based on the criteria we have previously applied

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[16] AT&T Reply to Oppositions filed June 22, 1993, at 2, n.1 (AT&T Reply).

[17] *Sierra Club v. Morton*, 405 U.S. 727 (1972).

[18] *Id.* at 733; *see Lawrence N. Brandt*, 3 FCC Rcd 4082 (1988) (*Brandt*); *National Broadcasting Co.*, 37 FCC 2d 897, 898 (1972); *see also Martin - Trigona v. FCC*, 432 F.2d 682 (D.C. Cir. 1970).

[19] *See, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72, 78 (1978) (*Duke*); *Brandt*, 3 FCC Rcd at 4082.

[20] *Duke*, 438 U.S. at 74; *see also Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976) (*Simon*); *Brandt*, 3 FCC Rcd at 4082.

[21] *Duke*, 438 U.S. at 81; *see also Simon*, 426 U.S. at 39; *Brandt*, 3 FCC Rcd at 4082.

[22] AT&T Petition to Deny filed May 28, 1993, at 6 (AT&T Petition); *see also FTC Communications, Inc.*, 4 FCC Rcd 1396, 1399, n.4 and 9 (1989).

[23] ENTEL argues that AT&T has not provided supporting affidavits, in accordance with Section 63.52(c) of the Commission's Rules, 47 C.F.R. § 63.52(c), to support its allegations of fact "as to settlement rates, net outpayments, and the like...." ENTEL Opposition, at 6-7. In response, AT&T contends that the facts presented are based on information contained in U.S. Government documents and in public records on file with the Commission. Therefore, AT&T argues, affidavits are unnecessary. AT&T Reply, at 2, n.1. In this proceeding, AT&T's position as an authorized U.S. international carrier, and the relevant accounting rate agreements and settlement outpayments, upon which AT&T relies, are facts that are on file with or developed by the Commission and of which official notice may be taken. Consequently, we find that AT&T has met the requirements of Section 63.52(c).

[24] ENTEL Opposition, at 8.

[25] Response of Northland Communications, Inc. filed June 28, 1993, at 4, n.3. (Response of Northland).

[26] *Id.* at 4.

[27] *See* AT&T Petition for Rulemaking, Market Entry and Regulation of International Common Carriers With Foreign Carriers Affiliations, RM-8355, filed September 22, 1993 (RM-8355).

in ruling on applications of foreign carriers to enter the U.S. telecommunications market as international facilities-based carriers, not on policies parties urge us to adopt prospectively. In the past, we have examined applications filed by foreign carriers on a case-by-case basis, balancing our policy in favor of open entry against the potential for discrimination by a foreign carrier against unaffiliated U.S. carriers.[28] As the Commission indicated in *TLD*, the public interest does not necessarily require that we deny the facilities-based entry of a U.S. affiliate of a foreign carrier where it appears that: (1) nondiscrimination safeguards are sufficient to protect U.S. carriers in their provision of U.S. international service from discrimination that might occur as a result of such entry; and (2) the balance of public interest considerations favors granting the application.[29]

14. We have consistently sought to promote open entry in the United States for carriers originating or terminating U.S. international voice or record carrier services. This policy encourages competition in these services in order to foster lower prices and increased service choices for U.S. consumers. As we noted in *TLD*, however, we do consider the closed nature of foreign markets to be a serious problem. The absence of market entry opportunities for U.S. carriers on the foreign end of a U.S. international route raises the potential for discrimination by a foreign carrier against unaffiliated U.S. carriers seeking to terminate traffic in the foreign market. We also are concerned about the absence of such opportunities in light of demands by U.S. multinational firms for end-to-end telecommunications services and the advantages of "one-stop shopping."[30] Foreign carriers that are permitted to offer end-to-end service on a U.S. international route could obtain an unfair competitive advantage unless U.S. carriers are permitted to do the same. Thus, we agree with AT&T's general conclusion that the competitive strengths and abilities of individual service providers -- rather than the regulatory structure of markets -- should determine the success of service providers in the global telecommunications market.[31] Asymmetrical market access could adversely affect the U.S. public interest by undermining the benefits of our open entry policy. For this reason, consistent with existing Commission policy, we will consider, as one factor in our public interest analysis, the degree to which Chile's telecommunications market and regulatory regime provide U.S. firms with effective opportunities to compete with ENTEL-Chile.[32]

15. We decline in the context of this Section 214 proceeding, however, to apply strictly AT&T's proposed standard of comparable market access as a condition precedent to entry by ENTEL. Such a standard would have broad policy implications on numerous parties who are not parties to this Section 214 proceeding and have not had an opportunity to comment. Accordingly, the merits of this standard should be considered in the context of AT&T's petition for rulemaking. We currently are reviewing the comments filed in response to AT&T's petition. Moreover, we will not examine in this proceeding Spain's telecommunications market structure or regulatory regime. As we conclude below, the record does not support a finding that Telefonica has either the legal right or actual ability to control the affairs of AmericaTel, ATA or ENTEL or its parent company, ENTEL-Chile.

D. Telefonica's Potential Control of ATA and ENTEL

(1)Positions of the Parties

16. In its petition to deny, AT&T urges us to determine whether Telefonica has the ability to exercise control over ENTEL-Chile and ENTEL, and, thus, whether it can exercise control over AmericaTel and ATA. If we find in the affirmative, argues AT&T, we should deny this application until U.S. firms are provided comparable market access in all countries where ENTEL-Chile and Telefonica operate as "monopoly or duopoly providers."[33] While AT&T does not argue explicitly that Telefonica controls ENTEL-Chile, it does cite a press report stating that "Telefonica actively participates in the management of ENTEL-Chile."[34] As discussed *supra* in paragraph 11, AT&T notes in its supplemental comments Telefonica's stated intention to divest its interest in either ENTEL-Chile or CTC by October 1994, consistent with Resolution 368 of Chile's Anti-Monopoly Commission (AMC).[35] AT&T, therefore, requests that we condition any grant on Telefonica's timely divestiture.

17. Applicants, in response, argue that Telefonica has only a 20 percent interest in ENTEL which is "regulatorily irrelevant" to the determination of the subject application. Applicants contend that under Commission rules and polices established in *International Services*,[36] the proper standard for determining "affiliation" is control.[37] Applicants further allege that Telefonica does not and will not control ENTEL, AmericaTel or ATA. Applicants state that Telefonica's indirect interest in AmericaTel and ATA will be only 16 percent. This indirect ownership stake, Applicants argue, is insufficient to provide Telefonica with *de facto* control, and there are no agreements or arrangements that afford Telefonica *de jure* control. Applicants also allege that ENTEL is not under any form of control by Telefonica and that "no Telefonica employee works for ENTEL, in any capacity...."[38] Applicants further note that Telefonica will be unable to gain control of ENTEL in the

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[28] *See TLD*, 8 FCC Rcd at 108.

[29] *See id.* at 109.

[30] *See* AT&T Petition, at 5.

[31] *See* AT&T Petition, at 6.

[32] *See TLD*, 8 FCC Rcd at 113 ("This potential discrimination could adversely affect the public interest by undermining the benefits of competition, and is one factor, among several, that is relevant to the Section 214 public interest determination.").

[33] *See* AT&T Petition, at 2.

[34] *Id.*, at 1, n.2.

[35] The AMC found in Resolution 368 that Telefonica controls CTC and that Telefonica's common ownership in ENTEL-Chile and CTC could undermine competition in Chile's telecommunications markets. When the AMC issued Resolution 368 (April 7, 1992), CTC provided local telephone service to 95 percent of Chile's local telephone subscribers and ENTEL-Chile handled nearly 100 percent of Chile's domestic and international long distance traffic. Resolution 368 was upheld by Chile's Supreme Court of Justice which ordered Telefonica to divest its interest in ENTEL-Chile or CTC by October 1994. For a more detailed discussion of the role and power of the AMC, *see infra* paras. 22-23; *see also* Resolution 368, which was filed with ENTEL's March 10, 1994 ex parte filing.

[36] *See Regulation of International Common Carrier Services*, 7 FCC Rcd 7331 (1992) (*International Services*).

[37] *See* ENTEL Opposition, at 5.

[38] *Id.*, at 4.

future by increasing its holdings because ENTEL's bylaws prohibit any single shareholder from owning more than 20 percent of ENTEL's shares.[39]

(2) Discussion

18. Our determination of whether a particular entity holding a minority stock interest in a corporation actually controls that corporation depends primarily on whether that shareholder has the power to "dominate" the management of corporate affairs.[40] This standard acknowledges that influence and control are not identical.[41] A minority shareholder does not necessarily control a corporation unless it exercises influence to a degree that "determines" the company's policies and operations, or "dominates" the company's corporate affairs. Thus, the facts of a particular situation (*e.g.*, who has the power to direct the company's operations, who determines the makeup of the Board of Directors) are relevant to determining who controls a company.[42] Based on these guidelines, we examine the specific facts of this application.

19. We find that Telefonica's indirect 16 percent ownership of AmericaTel and ATA will not in and of itself provide Telefonica with the ability to control or determine the affairs of AmericaTel or ATA. Furthermore, based upon a review of AmericaTel's and ATA's bylaws, we find that Telefonica's indirect 16 percent interest in each does not give Telefonica the ability to appoint directly representatives to the Boards of ATA or AmericaTel. Rather, Telefonica's ability to appoint members to these boards is a function of its 20 percent ownership of ENTEL-Chile. To assist us in monitoring the extent of any direct participation by Telefonica in the affairs of AmericaTel and ATA in the future, we require, as a condition of our grant of this application, AmericaTel or ATA to notify the Commission within seven days if ENTEL appoints a person to the AmericaTel or ATA Board who is a representative of either Telefonica or a person or company directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, as long as Telefonica has an ownership interest in ENTEL-Chile.

20. We additionally conclude that, under ENTEL-Chile's current bylaws, Telefonica is unable to control ENTEL-Chile's corporate affairs by participating either as a member of ENTEL-Chile's Board or as a 20 percent shareholder.[43] ENTEL-Chile's bylaws provide that business decisions made by the Board must be approved by at least three members. Because Telefonica appoints only two out of nine Board members, it is unable, on its own, to control or determine business decisions made by ENTEL-Chile's Board. Telefonica is also unable in the normal course[44] to amend ENTEL-Chile's bylaws or compel or block other shareholder actions because it does not control a majority of the votes that would be required to take such action.[45] Hence, we find that Telefonica does not have the ability, as either a legal or factual matter, to control ENTEL-Chile.

21. The Commission recently concluded in *International Services* that, absent a controlling interest in a U.S. carrier, a foreign carrier would be unable to direct the actions of the U.S. carrier, and the U.S. carrier would be unwilling to risk sanctions by the Commission for discriminatory conduct that violated Commission rules, policy or any conditions of its Section 214 certificates.[46] Because we find that Telefonica does not control ENTEL-Chile, and in light of Chile's ongoing progress in developing safeguards to control potential discriminatory abuse of CTC's local bottleneck,[47] we deny AT&T's request that we condition grant of the AmericaTel/ENTEL Application on Telefonica's timely compliance with the AMC Resolution on divestiture.[48] We also decline to examine in this proceeding the legal, regulatory or market structure of countries where Telefonica operates as a monopoly or duopoly provider of telecommunications.

E. Chile's Telecommunications Market and Regulatory Regime

1. Overview and Uncontested Facts

22. Since 1982, the Subsecretariat of Telecommunications (SUBTEL) has regulated telecommunications in accordance with Chile's General Law on Telecommunications (Law 18,168).[49] Law 18,168 allows private ownership of telephone companies and places no limits on the number of carriers that may obtain operating licenses and provide domestic and international long distance services in Chile. The law also permits the marketplace to set prices, except in those sectors of the telecommunications market that are not competitive and

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[39] *Id.*, at 4-5.

[40] *Benjamin L. Dubb*, 16 FCC 274, 289 (1951).

[41] *McCaw Cellular Communications, Inc.*, 4 FCC Rcd 3784 (Com. Car. Bur. 1989)(*McCaw*).

[42] *McCaw*, 4 FCC Rcd at 3789, (citing *Metromedia, Inc.*, 98 FCC 2d 299, 306 (1984)).

[43] ENTEL-Chile's bylaws prohibit any single shareholder from owning more than 20 percent of ENTEL-Chile's shares.

[44] We note that under ENTEL-Chile's bylaws, certain actions, including appointment of members of the Board and amendment of the bylaws, can be taken by a vote of less than a majority of the outstanding shares of voting stock. This could occur if the holders of less than a majority of outstanding shares attended a shareholder meeting. In this event, the bylaws permit ENTEL-Chile to convene a second meeting at a later date during which action may be taken by a majority vote of those present, regardless of the number of shares represented. In any event, the possibility that absenteeism at a shareholders meeting could give a minority the right to control the outcome of that meeting does not mean such minority shareholders have control; this is a possibility in any corporation.

[45] ENTEL bylaws allow proxy votes in shareholder meetings. The bylaws, however, also prevent Telefonica from increasing its voting power above 20 percent through proxy votes in shareholder meetings. *See* The By-Laws of ENTEL, at 9, found in ENTEL's Ex Parte Filing of March 10, 1994.

[46] 7 FCC Rcd at 7332. We also noted that U.S. carriers are subject to ongoing reporting requirements that are designed to detect discrimination by foreign carriers or administrations in favor of specific U.S. carriers. We also retained the option to impose or reimpose dominant carrier regulation on a particular carrier found to have engaged in anticompetitive conduct.

[47] *See infra* paras. 22-24, 29-39.

[48] *See supra* n.35. We also note that the condition proposed by AT&T would enable Telefonica to block or delay the emergence of ATA as an operating carrier in the United States by delaying divestiture. Telefonica would have an incentive to delay ATA's entry into the U.S. market because ATA may compete with Telefonica-controlled TLD to provide international service to U.S. consumers.

[49] *See* Law 18,168, which was filed with ENTEL's Ex Parte Filing of March 10, 1994 (Law 18,168); *see also* attachment of Law 18,168, which was filed with ENTEL's Ex Parte Filing of October 4, 1993 (Law 18,168 attachment).

contains broadly stated provisions against discrimination.[50] Numerous provisions of Law 18,168 were debated and were the subject of a series of legal disputes in Chile between the late-1980s and April 1994.[51] In addition to SUBTEL, the AMC also plays an important role in Chile's regulatory regime because of certain provisions of Law 18,1684[52] and because of AMC's general mandate to foster competition in Chile's economy and prevent monopoly abuse. The AMC is authorized to issue legally-binding resolutions on a wide variety of subjects related to competition.[53]

23. Two resolutions issued by AMC's highest level body relevant to this proceeding are Resolution 368 and Resolution 389, both of which were upheld by the Supreme Court. Resolution 368, issued April 7, 1992, ordered Telefonica to divest its holdings in either CTC or ENTEL-Chile because the AMC found these investments could undermine the emergence of competition in Chile's telecommunications markets.[54] Resolution 389, issued April 16, 1993, is intended to promote competition in Chile's telecommunications markets. This Resolution grew out of a 1989 request by SUBTEL to the AMC to determine whether and under what conditions carriers such as CTC would be permitted to provide long distance services and whether carriers such as ENTEL-Chile would be allowed to provide local telephone services.[55] Resolution 389 contains detailed provisions dealing with issues such as structural separation of local and long distance affiliates, nondiscriminatory interconnection arrangements, implementation of a multicarrier dialing system,[56] and sharing of network information among carriers.[57] Collectively, these provisions are designed to foster competition in Chile's local and long distance telecommunications markets, including the international market. On January 24, 1994, the Chilean Supreme Court upheld Resolution 389.[58]

24. While Resolution 389 was before the Chilean Supreme Court, the Chilean Legislature was debating amendments to Law 18,168. These amendments, known as Law 3-A, were passed by the Legislature and signed into law by the President of Chile on March 10, 1994. Law 3-A and Resolution 389 overlap in many areas and contain similar, although not identical, objectives, basic principles, mechanisms, and language. It is unclear whether Law 3-A supersedes Resolution 389, and it is possible that differences between the measures may ultimately have to be resolved by Chile's Supreme Court. In this section, however, we make our determination regarding Chile's regulatory regime based on the degree to which Law 18,168 and Law 3-A provide U.S. firms with effective opportunities to compete with ENTEL-Chile. We have examined Resolution 389 in its entirety, but discuss only key provisions of the resolution that are significantly different from Law 3-A.

2. Ability to Invest and Obtain Licenses

(1) Positions of the Parties

25. Applicants argue that Chile has one of the world's most liberal, open and competitive markets.[59] They state that Chile places few, if any, restrictions on foreign investment and participation in its telecommunications markets.[60] Applicants note that foreign companies participate as minority and majority shareholders of Chilean telephone companies licensed to provide cellular services, domestic and international long distance telecommunications services, and local telephone services.[61] Applicants also state that Chile's telecommunications markets have become increasingly competitive during the last two years because SUBTEL has granted operating licenses to a growing number of companies that provide cellular, long distance and local services. Applicants note, for example, that as of February 1994, SUBTEL had granted intermediate carrier licenses to provide international long distance services to four companies in addition to ENTEL-Chile.[62]

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[50] *See* Law 18,168, Articles 2, 3, 4, 8, 12; *see also* Law 18,168 attachment, Articles 29-30K.

[51] *See* Resolution 368, 1-2, which was filed with ENTEL's Ex Parte Filing of March 10, 1994 (Resolution 368); *see also* Resolution 389, 1-3, which was filed with ENTEL's Ex Parte Filing of March 10, 1994 (Resolution 389).

[52] According to Law 18,168, the AMC must periodically determine whether Chile's telecommunications markets are competitive. Tariffs in those sectors of the telecommunications market that the AMC finds are not competitive are regulated by SUBTEL based on tariff formulas that are in effect for five year periods. The tariff formulas are based on principles set out in Law 18,168 as well as input from SUBTEL, various governmental entities and carriers. The first five year tariff period covered local and long distance telecommunications services between 1989 and 1993. The second five-year tariff period covers local and long distance telecommunications services between the period 1994 and 1999. *See* Ley General de Telecomunicaciones, Article 29, which was filed with ENTEL's Ex Parte Filing of October 9, 1993.

[53] Resolutions issued by AMC's highest level body take effect upon release. Resolutions may be appealed to the Supreme Court, but they are binding even while on appeal, unless the court states otherwise. According to AMC staff, the AMC may review laws issued by Chile's legislature, and laws do not necessarily supersede AMC resolutions. Differences between AMC resolutions and laws that address the same issue may ultimately be presented to Chile's Supreme Court for resolution. Telephone conversations by Robert G. Stephens (FCC) with Eliana Carrasco Carrasco (AMC) on March 22, April 28, and May 3, 1994. *See* FCC Memorandum, File No. I-T-C-93-160-TC, May 27, 1994.

[54] *See* Resolution 368, at 5-7.

[55] *See* Resolution 389, at 1-2.

[56] See para. 35 for a description of the multicarrier dialing system.

[57] *See* Resolution 389, at 13-16.

[58] *See* Supreme Court decision on Resolution 389, at 1-3, 8, which was filed with ENTEL's March 10, 1994, ex parte filing.

[59] *See* Opposition of Northland Communications, Inc., filed June 10, 1993, at 8 (Northland Opposition).

[60] *See* ENTEL Opposition at 5.

[61] According to ENTEL, the following foreign companies have holdings in Chilean cellular providers: BellSouth (100 percent of CIDCOM); Motorola (66.7 percent of Telecom); and Millicom of Italy (50 percent of VTR Cellular). The following foreign companies have holdings in Chilean long distance carriers: Chase Manhattan Bank (11.7 percent of ENTEL-Chile); Banco de Santander of Spain (10 percent of ENTEL-Chile); COMSAT (50 percent of SATEL, which provides IBS and domestic and international VSAT data services); BellSouth (100 percent of CIDCOM Larga Distancia); and Italcable of Italy (35 percent of VTR Telecomunicaciones). As noted earlier (para. 4, *supra*), Telefonica owns 43 percent of CTC. *See* ENTEL Opposition at Attachment C.

[62] *See* ENTEL Ex Parte Filing of January 31, 1994 at 1; *see also* ENTEL Ex Parte Filing of March 4, 1994 (A copy of a

26. In its supplemental comments, AT&T agrees that present market conditions in Chile reflect an emerging competitive market where new entrants may participate in the long distance domestic and international services market regardless of foreign ownership. AT&T also agrees that Chile has imposed no limitations on the number of facilities-based competitors in its long distance market.

(b) Discussion

27. Based on the foregoing record, we find that there are no relevant legal restrictions on the ability of U.S. and other foreign entities to invest in the Chilean international long distance telecommunications marketplace or to obtain licenses to operate as international facilities-based long distance carriers. In addition, we do not find any provisions in Chile's laws or regulations that give Chilean-owned carriers preferential treatment vis-a-vis U.S. or foreign-owned telecommunication companies.[63]

28. Currently, ENTEL-Chile is one of five carriers authorized by SUBTEL to provide facilities-based international telecommunications services as an intermediate carrier.[64] These carriers are: VTR Telecomunicaciones S.A.; CHILESAT S.A.; T.D.I.; and CIDCOM Larga Distancia (a wholly-owned subsidiary of BellSouth). Thus, we conclude that U.S. carriers have the ability to invest and obtain licenses to operate in Chile in competition with ENTEL-Chile.

3. Effective Opportunities to Compete

(1) Positions of the Parties

29. Applicants, in general, argue that their application should be granted because Chile's government has adopted procompetitive policies. Applicants certify that neither ENTEL nor ENTEL-Chile controls "a bottleneck for telecommunications services or facilities in Chile."[65] Furthermore, Applicants argue neither AmericaTel/ATA nor ENTEL can control or determine traffic routing decisions of local telephone companies in Chile. According to Applicants, routing of outgoing international traffic to Chilean international carriers is currently controlled by Chilean local telephone companies such as CTC.[66] As evidence of ENTEL's inability to influence CTC's routing decisions, Applicants note that ENTEL-Chile faces substantial actual competition in international long distance services, and that its market share has dropped "precipitously"[67] as a result of CTC routing decisions. Applicants state that, as of May 1993, ENTEL-Chile's market share had declined to between 20 to 30 percent of its May 1992 level for many routes (including Chile-United States) and to 20 percent of the May 1992 share for the Chile-Spain route.[68]

30. AT&T concludes in its Supplemental Comments that implementation of Chile's new telecommunications laws likely will overcome barriers to competition that allegedly exist today in Chile's long distance market. Barriers continue to exist, according to AT&T, primarily as a result of CTC's control over 95 percent of Chile's local access lines. AT&T argues that at present, CTC controls the fate of Chilean long distance carriers through its control of the allocation of long distance traffic.[69] AT&T reads Section III of Resolution 389 to require CTC during the transition to a multicarrier system to allocate all outbound international traffic in a manner that ensures that "ENTEL receives the same number of minutes it was receiving in September 1990."[70]

31. AT&T additionally notes, however, that Law 3-A requires all Chilean public service carriers to implement a multicarrier system within four months of enactment. AT&T concludes that this system will afford dialing parity to all long distance carriers. It also cites other provisions of Law 3-A that establish structural and nonstructural safeguards designed to prevent CTC and other public service carriers from leveraging their control over local exchange bottlenecks into the long distance market.[71] Although AT&T finds several shortcomings in Law 3-A, it does not find these sufficient to deny the AmericaTel/ENTEL Application.[72] Rather, it concludes that, coincident with the

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letter date December 9, 1993, sent by the Chilean Undersecretary of Telecommunications to Chairman Hundt)(Letter to Chairman Hundt).

[63] *See* Law 3-A which was filed with ENTEL Ex Parte Filing of March 10, 1994 (Law 3-A); *see also* Titles I, II, III of Law 18,168.

[64] Since 1982, providers of telecommunication services in Chile are classified among five categories pursuant to Law 18,168 and Law 3-A. The categories relevant to this proceeding are "intermediate carriers," and "public service carriers." *See* Letter to Chairman Hundt; *see also* AmericaTel Supplemental Request For Expedition filed January 31, 1994, at 2 (AmericaTel Supplemental Request), and AT&T Supplemental Comments at 7. Prior to the enactment of Law 3-A, public service carriers such as CTC could provide only local telephone service. Intermediate carriers, such as ENTEL-Chile, could only provide domestic long distance and international services as a carriers' carrier. *See* Resolution 389 at 1-3. Law 3-A, however, allows CTC to provide long distance services and ENTEL-Chile to provide local telephone services if these services are offered through a separate open stock (*i.e.* publicly-held) subsidiary and CTC and ENTEL-Chile comply with additional conditions and safeguards detailed in paras. 22-24 *supra*, and 32-36 *infra*.

[65] *See* AmericaTel/ENTEL Application at 11.

[66] Supplemental Response of ENTEL International B.V.I. Corporation filed June 29, 1993, at 4 (ENTEL Supplemental Response).

[67] ENTEL Opposition at 11.

[68] *See* ENTEL Opposition at 11, and n.11. *See also* ENTEL Ex Parte Filing of June 27, 1994.

[69] AT&T does not contest that ENTEL's market share of outgoing international traffic is 20 percent to 30 percent of its pre-May 1992 level. *See* ENTEL Opposition at 11 and n.11. *See also* AT&T Supplemental Comments at 3, n.3.

[70] AT&T Reply, at 4-5, n.8. In September 1990, ENTEL handled nearly 100 percent of Chile's international long distance traffic.

[71] *See* AT&T Supplemental Comments at 10-18.

[72] *See id.* at 10-11, 13, 20. AT&T is concerned that resale may not be a viable form of entry in Chile. AT&T also is concerned that Law 3-A does not prohibit the sharing of resources or functions between public service carriers and their affiliates that provide long distance services. It also states that Law 3-A fails to establish effective cost allocation rules to prevent subsidization of competitive services by monopoly services. AT&T in addition argues that the provisions dealing with market share during a three year period after the multicarrier system begins to operate do not provide adequate protection from a local company favoring its long distance affiliate. (During three years following implementation of the multicarrier system, Law 3-A places limits, or caps, on the maximum percentage of domestic and

implementation of these safeguards, and subject to certain operating conditions, the Commission could conclude that Chile is likely to offer actual market opportunities to U.S. firms in Chile's long distance market comparable to those available in the United States within a reasonable period, which, according to AT&T, should not exceed two years. AT&T also urges the U.S. Government and the Commission to consult with Chilean authorities in order to establish certain additional safeguards.[73]

(b) Discussion

32. In determining whether to permit facilities-based entry by foreign carriers into the U.S. telecommunications market, the Commission in the past has examined the potential for discrimination against competing U.S. international carriers and the effectiveness of safeguards in preventing such discrimination.[74] As we stated in Section III.C. *supra*, foreign carriers that are permitted to offer end-to-end service on a U.S. international route could obtain an unfair competitive advantage unless U.S. carriers are permitted to do the same. Our determination of whether and under what conditions to grant the AmericaTel/ENTEL Application, therefore, depends in part on the degree to which we find that market conditions and regulation in Chile are adequate to protect unaffiliated U.S. international carriers from potential discrimination by ENTEL-Chile or from other unfair competitive advantages that may accrue to ATA as a result of its affiliation with ENTEL-Chile.

33. At the outset, we find no evidence that ENTEL-Chile owns or controls switching or other key facilities with which other international long distance carriers must interconnect in order to provide telecommunications services in Chile. We do find, however, that CTC controls bottleneck local telephone facilities in Chile. Any carrier that currently seeks to provide domestic long distance or international service to approximately 95 percent of Chilean local telephone subscribers must interconnect with CTC facilities. Given this finding, we are concerned about CTC's ability to discriminate among carriers that seek to compete in Chile's long distance market. CTC could, for example, give preferential interconnection or traffic routing arrangements to ATA, ENTEL-Chile or any other carrier. We are particularly concerned that CTC may route traffic arbitrarily to carriers of its own choice, because the multicarrier system mandated by Law 3-A and Resolution 389 has not yet been implemented. As a result, we conclude that CTC has the ability to discriminate against U.S. carriers until a multicarrier system and other safeguards are in place. Furthermore, as long as Telefonica is an equity holder in both ENTEL-Chile and CTC, CTC may have an incentive to discriminate in favor of ATA and ENTEL-Chile, or against a specific U.S. carrier that is competing against them.[75]

34. We further find, however, that Law 3-A contains detailed provisions and safeguards that should provide adequate protection to U.S. carriers. The new telecommunications law provides for structural and non-structural safeguards designed to prevent CTC and other local companies from leveraging their bottleneck control over local access into the long distance market. As noted earlier (*see infra* note 64), for example, Law 3-A permits local telephone companies to participate in the long distance market only through fully separated open stock companies. In addition, the law prohibits a local company from promoting or marketing the long distance services of its subsidiary or any other long distance company. Moreover, the law obligates the local companies to provide the same access arrangements to all competing long distance carriers (including carriers affiliated with the local companies) under nondiscriminatory terms and conditions. Access arrangements and prices are required to be published in tariffs that are subject to a regulatory review process administered by SUBTEL.

35. Law 3-A also requires implementation of a "multicarrier dialing system" that should significantly reduce CTC's ability to discriminate by arbitrarily allocating international long distance calls. Further, it appears that Law 3-A mandates the implementation of a multicarrier system by approximately August, 1, 1994.[76] Chile's multicarrier system will enable individual local telephone subscribers, instead of CTC, to select the long distance carriers to handle their traffic on a call-by-call basis. The subscriber will choose the carrier by dialing a prefix that identifies a specific carrier. Law 3-A specifies that all carrier prefixes must contain the same number of digits. These prefixes will be allotted by SUBTEL through a lottery. AT&T states, and we agree, that Chile's multicarrier system will achieve "dialing parity" for all competing carriers, including any long distance subsidiary CTC may establish.[77]

36. We find that Chile has made commendable progress in liberalizing its telecommunications markets, fostering competition and devising competitive safeguards to enable new entrants to compete effectively. For these reasons, we will not condition grant of this application, as AT&T's requests, on Chile's agreement to change or clarify provisions of Chile's regulatory regime on issues such as resale or cost allocation.[78] Rather than impose such a condition, we will require ATA to submit several progress reports detailing the status of the telecommunications industry and regulatory regime in Chile. ATA shall file this report not later than October 31 of each year from 1994 to 1998.[79]

37. We direct ATA to file a limited initial report by October 31, 1994, to advise the Commission on implementation of Chile's multicarrier system and Telefonica's divestiture of its interests in either ENTEL-Chile or CTC.

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international long distance calls that any single carrier is permitted to carry. *See* Law 3-A, at 16-17, filed with ENTEL's Ex Parte Filing of March 10, 1994.)

[73] *See id.* at 9, 13.

[74] *See TLD*, 8 FCC at 109 (1992). *See also Atlantic Tele-Network, Inc.*, 6 FCC Rcd 6529 (1991) *appl. for review denied*, 8 FCC Rcd 4776 (1993).

[75] We find that CTC has the ability to discriminate in favor of ENTEL-Chile, regardless of whether ENTEL-Chile can control CTC or vice-versa.

[76] The August 1994 deadline is an estimate based on provisions of Law 3-A. Law 3-A, which was enacted on March 10, 1994, orders SUBTEL to devise multicarrier system rules within a three-month period after publication of the law and that the public service carriers must implement a multicarrier system within 30 days of the pronouncement of such regulations. *See* Law 3-A at 15. Resolution 389, however, requires implementation of a multicarrier system by October 1994.

[77] *See* AT&T Supplemental Comments, at 14.

[78] *See* note 72, *supra*.

[79] The five year period will enable the Commission to monitor regulatory and market developments in Chile for one year after

Subsequent reports should contain: the text of any changes made since March 11, 1994 to Law 18,168 or Law 3-A; the text of any additional laws enacted in Chile since March 11, 1994 relevant to telecommunications; copies of any resolutions or decisions issued by the Chilean Anti-Monopoly Commission or Chilean Supreme Court since March 11, 1994 regarding the Chilean Anti-Monopoly Resolutions 368 and 389, as well as any other Anti-Monopoly Commission resolutions or Supreme Court decisions dealing with discrimination against telecommunication companies that provide international long distance telecommunication services in Chile; any descriptive information regarding enforcement and compliance with these laws, resolutions, court decisions and regulations, including implementation of the multicarrier system; a certified statement describing the ownership and membership of the Boards of Directors of ENTEL International B.V.I. and ENTEL-Chile; and a certified statement detailing whether ENTEL-Chile or an affiliate of ENTEL-Chile owns or controls telecommunication facilities that provide local telephone service in Chile, and, if so, whether this local public service carrier operates a multicarrier system. The reports should also provide any available information on ENTEL-Chile's market share of outgoing and incoming total direct dial telephone traffic billed and terminated in Chile on ENTEL-Chile's fifteen largest international routes, including the United States, during the previous calendar year. In addition, they should compare ENTEL-Chile's accounting rates with U.S. carriers to the accounting rates on each of ENTEL-Chile's fifteen largest international routes, including the United States, during the previous year and describe any changes to these accounting rates during the previous year.

38. These reports will provide us with the information necessary to assess the effectiveness and continuing need for the nondiscrimination safeguards we have adopted. They will also help us to evaluate the effectiveness of the safeguards imposed by Chile's regulatory regime in protecting unaffiliated U.S. carriers from discrimination and other unfair competitive advantages that potentially may accrue to ATA. We will review the terms and conditions of this authorization in the event that the safeguards imposed in this order, or by virtue of Chilean regulation, fail to sustain competition on the United States-Chile route. We will also carefully review the terms and conditions imposed in this order in the context of evolving market conditions if the October 1994 report reveals that Chile has not yet implemented key safeguards including, but not limited to, the multicarrier system, or Telefonica retains its interests in both ENTEL-Chile and CTC at that time.

39. In general, we expect Chilean authorities will resolve any pending or future issues regarding Chilean safeguards in a manner that will foster competition and prevent discrimination against U.S. carriers. For example, we remain concerned about the manner in which differences between Law 3-A and Resolution 389 will be resolved.[80] However, based on Chile's recent affirmative actions in rapidly liberalizing its telecommunications regime, we expect that Chilean authorities will promptly resolve the differences between Resolution 389 and Law 3-A in a manner that will foster competition and protect unaffiliated U.S. carriers from discrimination. The Commission will discuss regulatory matters, specifically with regard to nondiscrimination and resale issues, with Chilean authorities and plans to exchange information on these matters. Based on the preceding, we find that current market conditions in Chile, Chile's regulatory regime, and the regulatory safeguards we impose as a condition of this authorization[81] are sufficient to prevent ATA from obtaining an unfair competitive advantage or any undue preferential treatment as a result of its affiliation with ENTEL-Chile. We conclude that entry by ENTEL-Chile will not present a substantial risk of anticompetitive effects in the U.S. market for international telecommunications services.

F. Additional Public Interest Considerations And Determination Regarding Market Entry

(1) Positions of the Parties

40. Applicants argue that their application should be granted because it will promote the public interest. First, they argue that grant of this application will enable AmericaTel to become operational, which in turn will increase competition in the U.S. telecommunications market. Applicants note that AmericaTel is currently not operating because Northland, which controls AmericaTel, is not financially able to begin operations. Applicants allege that AmericaTel's successor, ATA, will be able to begin operating and offering services if ENTEL is allowed to gain control of ATA and invest in it. Applicants further argue that ATA will compete with other U.S. carriers and that this will further our procompetitive policies. Second, Applicants argue that ATA will be able to meet consumer needs that are not met by current providers.[82] Third, they contend that ATA will generate additional international traffic and that this will stimulate the U.S. economy and increase revenues from the provision of international telecommunication services in the United States. Applicants state that granting this application will promote economic development in the United States because ENTEL's investment in ATA will enable ATA to employ more U.S. workers and purchase U.S. telecommunications equipment.

(2) Discussion

41. We believe that grant of this application will lead to consumer benefits through increased competition in the U.S. telecommunications market. Competition fosters lower prices, innovative services and increased responsiveness to consumer needs, all of which in turn should help to stimulate economic growth in the United States. Insofar as grant of this application increases telecommunications traffic between the United States and Latin American countries, we believe that this will promote closer social, cultural and business ties between these nations.

42. We also anticipate that grant of this application may foster liberalization of other telecommunications markets around the world. We believe that the success of the United States and Chile in opening their markets to competi-

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the transitional provisions of Law 3-A are in effect. All documents must be filed in the original language along with certified English translations.

[80] *See, e.g.*, para. 35, note 76, *supra*.

[81] *See also infra* paras. 50-55.

[82] *See* Northland Response filed June 28, 1993, at 2.

tion may encourage other countries to emulate these liberalization policies and make their telecommunications markets more open to foreign investment and increased competition. For the foregoing reasons, we find that the public interest in the United States will be served by grant of this application.

G. Accounting Rates (1) *Positions of the Parties*

43. AT&T argues in its petition to deny that the Commission should condition any approval of the AmericaTel/ENTEL Application on ENTEL's agreement (and the agreement of any affiliate) to establish immediately nondiscriminatory, cost-based accounting rates with U.S. carriers on all routes.[83] AT&T contends that accounting rates between U.S. carriers and ENTEL remain considerably above-cost even though "ENTEL Chile has led the Latin American region in accounting rate reform and the introduction of new U.S. carrier services on a prompt and fair basis...."[84] AT&T argues that above-cost and discriminatory accounting rates force U.S. carriers and customers to fund foreign carriers in the global market. Conditioning grant of this application on reductions in accounting rates, argues AT&T, would provide significant benefits to U.S. customers of international telecommunications services.[85]

44. Further, in its Supplemental Comments, AT&T urges us to condition grant of this application on ENTEL-Chile's establishment of accounting rates for all U.S. carriers at the lessor of (a) cost based levels or (b) the lowest accounting rate that ENTEL-Chile has established with any other foreign carrier.[86] AT&T believes that a cost-based accounting rate with Chile would not exceed $0.36 per minute. AT&T argues that the disparity between cost-based accounting rates and ENTEL-Chile's current rates ($1.60 per minute peak, $1.00 off-peak) would provide ENTEL-Chile and ATA an unfair competitive advantage. AT&T suggests that unaffiliated U.S. carriers would have to set their prices for United States-Chile services at levels that would recover the cost of the settlement amounts paid to ENTEL-Chile. ATA, on the other hand, could treat the settlements due as a transfer payment, and design its prices accordingly.[87] AT&T argues in its supplemental comments that, so long as foreign carriers receive more revenues from terminating international traffic than they pay to foreign carriers, they will not have an incentive to reduce accounting rates. AT&T contends that only when price competition has reached the point that facilities-based carriers find they must lower their settlement costs to maintain competitive prices will a carrier have the incentive to reduce accounting rates.[88]

45. Applicants argue that the Commission should deny AT&T's request because accounting rates are not relevant to this proceeding and will not be reduced if this application is denied. Applicants also argue that there is no precedent for conditioning grant of this application on reductions in accounting rates. In *TLD*, Applicants note, the Commission rejected a request to condition Section 214 authorizations on accounting rate reductions.[89] Applicants also argue that accounting rate disparities were not created by Applicants and contest AT&T's allegations that the United States pays "subsidies" to other countries in the form of settlement payments to foreign carriers.[90]

(b) Discussion

46. We have long supported the implementation of lower, more economically efficient, cost-based international accounting rates.[91] Although we are encouraged by recent reductions in ENTEL-Chile's accounting rates with the United States,[92] we note that settlement rates with Chile remain substantially above the benchmark range adopted by the Commission for regions outside of Europe and Asia ($0.39-$0.60).[93] The Commission has substantial, uncontroverted evidence that the cost of the international portion of facilities used for international telephone calling has decreased significantly.[94] We recognize that different countries may have different costs for the national extension of the international call. The cost of the national extension, however, is unaffected by the point of origination of a call and thus does not explain the marked disparity in accounting rates maintained by individual countries with different correspondents. As we have previously noted, above-cost accounting rates are a primary reason for high U.S. collection rates for international telephone service.[95]

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[83] *See* AT&T Petition at 2. AT&T made the same request in its Petition to Deny with respect to Telefonica and its affiliates.

[84] AT&T Petition at 4.

[85] *See* AT&T Petition at 6-7.

[86] AT&T concedes that if ENTEL-Chile's costs of providing service to non-U.S. carriers are lower than its costs of providing service to U.S. carriers, then ENTEL-Chile would be justified in establishing a lower accounting rate with non-U.S. carriers. *See* AT&T Supplemental Comments at 22.

[87] AT&T argues that where a U.S. carrier makes a settlement payment to a foreign affiliate, the settlement payment is simply an intra-corporate transfer of funds that does not affect the overall profitability of the firm. Thus, states AT&T, the U.S. affiliate of the foreign carrier could price its services without the same concern unaffiliated U.S. carriers have with respect to the settlement payments owed to the foreign correspondent.

[88] *See* AT&T Supplemental Comments at 24, n.26.

[89] Northland Reply at 10-11.

[90] Northland Reply at iii, 7 and 13-15.

[91] *See generally, Regulation of International Accounting Rates*, CC Docket No. 90-337, *Phase I Report and Order*, 6 FCC Rcd 3552 (1991), *on recon.* 7 FCC Rcd 8049 (1992). *See also Regulation of International Accounting Rates, Phase II Second Report and Order and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 8040, 8046 (1992), *recon. pending*.

[92] *See supra* para. 44.

[93] *See supra* note 91, 7 FCC Rcd at 8041.

[94] *See* Report of the Common Carrier Bureau to the Federal Communications Commission, *International Accounting Rates and the Balance of Payments Deficit in Telecommunications Services* (1988), at 36 (*1988 Report*). The cost per voice path over transatlantic cable systems has decreased from $9,000 in 1988 (TAT-8) to $5,500 in 1989 (TAT-9), and to $2,500 in 1993 (TAT-10). Pacific and Caribbean undersea cables have shown similar decreases in cost per circuit. Finally, the cost per circuit for satellite communications has decreased significantly. For instance, the cost of service over a 64-Kbps INTELSAT circuit using an earth station with a gain over temperature (G/T) of 35 or greater decreased from $584 per month in 1987 to $355 per month in 1990. Substantial discounts for long-term commitments also have become available. *Compare* INTELSAT Service Manual (1988), at III.A.4 - III.A.6 *with* INTELSAT Service Manual (1990), at III.A.4 - III.A.6.

[95] *See Regulation of International Accounting Rates*, Phase I, Notice of Proposed Rulemaking, 5 FCC Rcd 4948, 4949, (1991) (Phase I NPRM). Between 1985 and 1992, U.S. carrier payments

47. Despite our concerns regarding ENTEL-Chile's accounting rates with its U.S. correspondents, we will not condition grant of this application on the immediate reform of ENTEL-Chile's accounting rates. We have previously concluded that, for now, we will rely on mechanisms other than conditioning Section 214 authorizations to encourage foreign correspondents to lower their accounting rates with U.S. carriers.[96] For example, we anticipate that regulatory actions and market forces may encourage ENTEL-Chile to reduce its accounting rates. In particular, we expect recent changes in Chile's regulatory regime (discussed *supra*, in Section III.E.) to accelerate the emergence of an increasingly competitive international telecommunications market in Chile. Such competition should lead to lower calling prices and a greater number of service alternatives for international long distance calls, including service to the United States. These actions should stimulate demand for service billed in Chile, and the increased usage of fixed plant should reduce the carriers' average unit costs. In addition, greater demand may increase the net revenues earned by the supplying carriers, thereby reducing their need to rely on settlement payments to finance investment. Therefore, we expect that the combination of new investment and decreasing average unit costs will make possible lower accounting rates and calling charges.

48. We note that we have directed U.S. carriers to negotiate with their foreign correspondents accounting rates that are consistent with relevant cost trends and that eliminate any noncost-based differences between accounting rates applied by a given foreign administration within its own region and those applied for the United States.[97] We reiterate that we expect cost-based accounting rates for service between the United States and Chile to be in effect within the time frame established by the ITU in Recommendation D.140, which was signed by the United States and Chile.[98] Although we will not condition this authorization on accounting rate reforms, we will require ATA to comply with any Commission policies and requirements concerning international accounting and settlement rates that we may adopt in future proceedings of general applicability.

49. AT&T also argues in this proceeding that settlement payments, when made between affiliated entities, are "transfer payments" that enable an affiliated U.S. carrier to price its U.S. services without regard to the full cost of settlements with its foreign affiliate. While we recognize AT&T's concern that the above-cost component of accounting rates may be used by a foreign carrier to subsidize its affiliated U.S. carrier's competitive operations in the U.S. telecommunications market, this concern is addressed in the next section by our dominant carrier policies, which require ATA to provide cost support for its tariffed international services on the U.S.-Chile route.[99] We also note that ATA will operate as a separate corporate entity from ENTEL-Chile, with separate books of account that are subject to audit by this Commission.[100] We conclude that such safeguards effectively guard against cross-subsidization abuse, and we therefore find no compelling reason to impose additional conditions to address the cross-subsidy concern raised by AT&T.[101]

H. Regulatory Treatment of Applicants

(1) Positions of the Parties

50. Applicants argue that ATA should be regulated as nondominant for all U.S. international routes and services, including both resale and facilities-based services.[102] Applicants note that ATA will be affiliated with a non-monopoly foreign carrier (ENTEL-Chile) that lacks the ability to discriminate against unaffiliated U.S. carriers.[103] Further, Applicants certify that neither ATA nor ENTEL has agreed or will agree to accept "special concessions," as defined in Section 63.01(r)(3)(i) of the Commission's rules, from any foreign carrier or administration with respect to traffic or revenue flows between the United States and any destination market, including Chile, served under ATA's Section 214 authorizations.[104] AT&T does not address the regulatory treatment of ATA in its pleadings.

(2) Discussion

51. In *International Services*, we established, among other things, a three-part framework for classifying U.S. international carriers with foreign carrier affiliations based on an assessment of the market power of their foreign carrier-affiliates.[105] Under this framework, ATA is presumptively nondominant on all U.S. international routes except for the United States-Chile route. Because it is affiliated with a non-monopoly foreign carrier in Chile, Applicants, in order to obtain nondominant status to Chile, bear the burden of submitting sufficient information to demonstrate that ENTEL-Chile lacks the ability to discriminate against unaffiliated U.S. carriers.[106]

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to foreign carriers in the form of annual settlement payments increased from $1.1 billion to $3.3 billion. Between 1985 and 1992, U.S. annual net settlement payments to Chile increased from $7.15 million to $16 million.

[96] *See TLD*, 8 FCC Rcd at 112.

[97] We also note that the issue of conditioning Section 214 authorizations on accounting rate reform has been raised in several proceedings. *See Phase II Second Further Notice*, 7 FCC Rcd at 8045, 8046. *See also* RM-8355.

[98] *See* CCITT Circular No. 169, COM III/ST, October 7, 1992. Specifically, Recommendation D.140 of CCITT Study Group III urges reductions in accounting rates to cost-based levels over a period of one to five years. *See also Phase II Further Notice*, 7 FCC Rcd at 8043 ("We accordingly expect countries in all regions to reduce their rates by about 50 percent ... and to achieve these reductions in one to five years as set forth in CCITT Recommendation D.140.").

[99] *See infra* para. 53.

[100] *See* Section 220(c) of the Communications Act, 47 U.S.C. § 220(c).

[101] *See TLD*, 8 FCC Rcd at 112.

[102] *See* AmericaTel/ENTEL Application at 7. *See also* Section 63.10 of the Commission's rules.

[103] *See* AmericaTel/ENTEL Application at 7-8.

[104] *See* AmericaTel/ENTEL Application at 2 and 16 (Attachment).

[105] Carriers that have no affiliation with a foreign carrier in the destination market are presumptively considered nondominant for that route. Carriers affiliated with a foreign carrier that is a monopoly in the destination market are presumptively considered dominant for that route. Carriers affiliated with a foreign carrier that is not a monopoly in the destination market receive closer scrutiny. *See International Services Order* 7 FCC Rcd 7334 (1992).

[106] *See International Services*, 7 FCC Rcd at 7334.

52. In accordance with this policy, we will regulate ATA as nondominant on all unaffiliated routes. Nothing in the present record rebuts the presumption that ATA will be nondominant for these routes. In contrast, however, we find that the Applicants have not met their burden of demonstrating that ENTEL-Chile does not have the ability to discriminate on the United States-Chile route. Even though ENTEL-Chile does not control bottleneck facilities and is not a monopoly, we believe that unaffiliated carriers could still face discrimination on this route because of Telefonica's common ownership of ENTEL-Chile and CTC. As we stated in para. 33 *supra*, as long as Telefonica is an equity holder in both ENTEL-Chile and CTC, CTC may have the incentive to discriminate in favor of ATA and ENTEL-Chile. This fact, coupled with our inability to predict the effectiveness of Chile's new regulatory regime in controlling potential discrimination in matters such as interconnection, routing of traffic and disclosure of network information, leads to our concern about the ability of ATA to gain an unfair competitive advantage vis-a-vis unaffiliated U.S. carriers. Therefore, we will regulate ATA as dominant for all services on the United States-Chile route, pursuant to *International Services*.

53. Accordingly, we require ATA to comply with the specific dominant carrier regulations set forth in paragraphs 70 through 73 of this Order, including the requirements that ATA file cost support for all tariffed services between the United States and Chile and that ATA seek specific Section 214 approval to add circuits or change facilities on the United States-Chile route. We will continue to regulate ATA as a dominant carrier for the United States-Chile route unless ATA demonstrates that it qualifies for nondominant regulation pursuant to *International Services*. If ATA applies for nondominant status, it must also update the information provided in the annual progress report detailed in paragraph 37 of this Order. Furthermore, by granting this assignment, we authorize ATA only to provide the same services specified, and under the same conditions imposed, in AmericaTel's Section 214 authorizations.

54. As further assurance that ATA does not gain an anticompetitive advantage by virtue of its relationship with ENTEL-Chile or any other foreign carrier, we note that ATA is bound by the following additional safeguards which reflect existing Commission policy. We require that a U.S. carrier: (i) accept only its proportionate share of return traffic from its foreign correspondents;[107] (ii) settle its accounts in accordance with the nondiscriminatory accounting rates it is required to file with this Commission; (iii) file copies of all contracts, agreements and arrangements that relate to the routing of traffic and settlement of accounts;[108] and (iv) not agree to accept any changes in its accounting rates that are not made equally available to all other competing U.S. carriers on a nondiscriminatory basis. Finally, we emphasize that the Section 214 certificates to be assigned to ATA do not permit ATA to route traffic to or receive traffic from third countries for which ATA does not have a Section 214 certificate.

55. Moreover, pursuant to Section 63.14 of our rules, ATA is precluded from agreeing to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the United States and any foreign country served under the authority of Part 63 of our rules.[109] The "no special concessions" obligation precludes ATA,[110] *inter alia*, from agreeing to accept from CTC or any other carrier or administration, including ENTEL-Chile, preferential or exclusive operating agreements or marketing arrangements for the provision of basic telecommunications services, including the introduction and provision of new basic services. It also precludes ATA from agreeing to accept any distribution or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operational characteristics, such as provisioning and maintenance times, at rates or on terms and conditions that are not available on a nondiscriminatory basis to all competing U.S. carriers. In addition, the no special concessions provision prohibits ATA from agreeing to accept any arrangement for the joint handling of basic traffic originating or terminating in third countries on terms and conditions not available on a nondiscriminatory basis to all competing U.S. carriers.[111] Finally, we note that the regulatory requirements adopted herein are subject to modification as a result of any action the Commission may take in any relevant future proceeding of general applicability.

IV. CONCLUSION

56. On balance we believe that the public interest will be served by grant of this application, subject to the conditions detailed in this Order . We believe grant of the application will lead to consumer benefits, as discussed above, through increased competition in the U.S. telecommunications market. We grant this application, in part, because Chile has opened its telecommunications markets to U.S. international long distance carriers and has enacted policies that provide for the continued liberalization of its regulatory regime. Finally, we believe grant of this application may encourage other countries to open their telecommunications markets to greater competition and to liberalize their regulatory regimes.

57. We remain concerned about potential discrimination against unaffiliated U.S. carriers because of Telefonica's joint ownership interest in ENTEL-Chile and CTC, and because of the evolving nature of Chile's regulatory regime. We believe, however, that the ongoing liberalization of Chile's regulatory regime and the various safeguards we adopt will be adequate to prevent ATA from gaining any undue advantages.

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[107] *See International Accounting Rates*, CC Docket No. 90-337, Phase II, *Second Report and Order & Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 8040 (1992) at para. 30.

[108] This would include, for example, agreements for the proportionate return of traffic, even where the agreement is not written. *See* Section 43.51(b) of the Commission's Rules, 47 C.F.R. § 43.51(b).

[109] "Special concession" is defined as any arrangement that affects traffic or revenue flows to or from the United States that is offered exclusively to a particular U.S. international carrier by a foreign carrier or administration.47 C.F.R. § 63.01(r)(3).

[110] All references to ATA, ENTEL-Chile, and CTC include their respective officers, directors, and employees, as well as any affiliated companies and their officers, directors and employees.

[111] *See also TLD*, 8 FCC Rcd at n.36.

V. ORDERING CLAUSES

58. Upon consideration of the subject application, IT IS ORDERED that application File No. I-T-C-93-160-TC IS GRANTED, and Northland Communications, Inc. is authorized to transfer control of AmericaTel Corporation to ENTEL International B.V.I. Corporation.

59. IT IS FURTHER ORDERED that upon consummation of the above-authorized transfer of control, AmericaTel Corporation is authorized to assign its Section 214 authorizations to AmericaTel Acquisition Corporation.

60. IT IS FURTHER ORDERED that any AmericaTel Corporation interests in pending applications for Section 214 authorization are authorized to be assigned to AmericaTel Acquisition Corporation.

61. IT IS FURTHER ORDERED that should ENTEL B.V.I., after acquiring control of AmericaTel Corporation, not immediately consummate the assignment of AmericaTel Corporation's Section 214 authorizations to AmericaTel Acquisition, then any conditions in this order that apply to AmericaTel Acquisition also shall apply to AmericaTel Corporation.

62. IT IS FURTHER ORDERED that AmericaTel's and ENTEL B.V.I. International's Motion to Dismiss American Telephone and Telegraph Company's Petition to Deny IS DENIED.

63. IT IS FURTHER ORDERED that ENTEL International B.V.I.'s and AmericaTel's Motions for Leave to File Supplemental Replies ARE GRANTED.

64. IT IS FURTHER ORDERED that American Telephone and Telegraph Company's Motion for Leave to File a Supplemental Reply in Response to ENTEL International B.V.I.'s Supplemental Response IS GRANTED.

65. IT IS FURTHER ORDERED that the Commission retains jurisdiction over this matter to reallocate circuits in the INTELSAT satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

66. IT IS FURTHER ORDERED that AmericaTel Acquisition Corporation shall not agree to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the United States and any country.

67. IT IS FURTHER ORDERED that AmericaTel Acquisition Corporation shall not route traffic to or from third countries for which it does not have authorization under Section 214 of the Communications Act, as amended, 47 U.S.C. § 214,

68. IT IS FURTHER ORDERED that AmericaTel Acquisition Corporation shall not bargain for nor agree to accept more than its proportionate share of return traffic from any country.

69. IT IS FURTHER ORDERED that AmericaTel Acquisition Corporation shall settle its international accounts in accordance with the nondiscriminatory accounting rates it is required to file with this Commission.

70. IT IS FURTHER ORDERED that AmericaTel Acquisition Corporation shall comply with any current and future Commission policies and requirements concerning international accounting and settlement rates and shall file copies of any operating agreements entered into by AmericaTel Acquisition Corporation or its parent/affiliates that affect traffic or revenue flows between the United States and Chile within 30 days of their execution.

71. IT IS FURTHER ORDERED that AmericaTel Acquisition Corporation shall seek, pursuant to Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, additional authorization under Section 214 of the Communications Act, 47 U.S.C. § 214, before adding or deleting circuits between the United States and Chile or before otherwise using its authorized circuits between the United States and Chile in a manner other than as specified in its Section 214 authorizations.

72. IT IS FURTHER ORDERED that AmericaTel Acquisition Corporation shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the United States and Chile that AmericaTel Acquisition Corporation is authorized to provide within 90 days from the end of each calendar quarter.

73. IT IS FURTHER ORDERED that AmericaTel Acquisition Corporation shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's rules, 47 C.F.R. Part 61, for the services authorized in this Order. In addition, AmericaTel Acquisition Corporation shall file cost support for its tariff rates between the United States and Chile.

74. IT IS FURTHER ORDERED that AmericaTel Acquisition Corporation shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

75. IT IS FURTHER ORDERED that AmericaTel Acquisition Corporation shall file progress reports no later than October 31 of each year between 1994 and 1998. These reports shall contain the information specified in paragraph 37 of this order.

76. IT IS FURTHER ORDERED that so long as Telefonica has an ownership interest in ENTEL-Chile, AmericaTel or AmericaTel Acquisition Corporation shall notify the Commission within seven days of any appointment of any person by ENTEL to the AmericaTel or AmericaTel Acquisition Corporation Board that is a representative of either Telefonica or any person or company directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it.

77. IT IS FURTHER ORDERED that the regulatory requirements adopted herein are subject to modification as a result of any action the Commission may take in any relevant future proceeding of general applicability.

78. This order is effective upon release. Petitions for reconsideration under Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106 may be filed within 30 days of public notice of this Order. (*See* Commission rule 1.4(2)(2), 47 C.F.R. § 1.4(2)(2)).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

CONCURRING STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

RE: ENTEL CHILE

I concur today and write separately to express my continuing concern over the lack of symmetry that often exists between this Commission's treatment of foreign carriers seeking to enter the U.S. market and foreign governments' treatment of U.S. carriers seeking to enter their markets.

As a result of today's action U.S. carriers will face increased competition at home from an AmericaTel fueled by the infusion of ENTEL's Chilean capital. U.S. carriers seeking to do business in Chile, however, can only hope that Chile's stated policy of facilitating competition in its domestic market will be fully implemented and that they will some day - hopefully not too long in the future - benefit from it.

To me, that's not a fair bargain. For this reason I would have preferred to condition approval of this acquisition upon a showing, after adequate study, that U.S. carriers in Chile are in fact accorded market entry and participation conditions comparably favorable to those we grant ENTEL today. Without this, ENTEL gets its bird in the hand, but our domestic carriers have to trust to the proverbial two in the bush.

My difficulty here is neither with the prospect of increased domestic competition nor with any misgivings about the sincerity of Chile's efforts to liberalize competition in its country. Rather, I believe there comes a time when one must first look at the undeniably vigorous competition that exists here at home, then contrast it with the degree of competition that our U.S. carriers are permitted to engage in abroad, and finally ask whether the incremental increase in competition here is worth settling for competitive inequity there. Every time the Commission settles for less than a full competitive loaf from our foreign counterparts we cost U.S. carriers substantial revenues and sacrifice jobs and economic growth for what, in our already-competitive U.S. market, is a negligible consumer payback.

Chile is on its way to becoming an open market. That being the case, taking the necessary further steps to make sure that these open market policies are in fact fully implemented would require little. Simply put, the Commission's problem isn't how to increase competition here - it's how to increase competition abroad. And at some point our current fingers-crossed, lead-by-example approach to these reciprocity-based issues is just not enough. In the case of ENTEL, perhaps it is. But to successfully grapple with other cases this Commission needs to develop specific tests by which to gauge the degree to which comparably favorable treatment does or does not exist.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PETITION OF WALT DISNEY COMPANY FOR WAIVER OF PROGRAM ACCESS RULES — CSR-4197-P

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 1994; Released: August 3, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition for Waiver of Program Access Rules ("Petition") filed by The Walt Disney Company "("Disney").[1] The program access rules[2] were adopted to "implement Section 19 of the Cable Television Consumer Protection and Competition Act of 1992,[3] which added a new Section 628 to the Communications Act of 1934, as amended.[4] The Commission's Rules further provide that "|o|n petition by a cable television system operator . . . or by any other interested person, the Commission may waive any provision of the rules relating to cable television systems," which would include the provisions of the program access rules.[5]

2. Disney's Petition, which has not been opposed, "requests that the Commission waive its program access rules . . . to the extent such rules might result in the Disney Channel, a wholly owned subsidiary of Disney, being considered a vertically integrated programmer by virtue of a program distribution system operated by the Madeira Land Company, Inc. ("Madeira"), also a wholly owned subsidiary of Disney, at the Walt Disney World Resort Complex near Orlando, Florida."[6]

3. For the reasons set forth below, we determine that it is in the public interest to waive the program access rules with respect to Disney, to the extent that Disney's ownership of Madeira might otherwise trigger application of these rules, and we thus grant Disney's Petition subject to the conditions specified herein.

II. BACKGROUND

4. The Disney Channel, a wholly-owned Disney subsidiary, is a twenty-four hour, satellite-delivered, commercial-free, premium programming service offered to consumers through cable systems and other multichannel video programming distribution systems. It is carried by cable systems representing more than ninety-five percent of the cable subscribers in the United States, and has more than seven million subscribers nationwide.[7]

5. Madeira is also a wholly-owned Disney subsidiary. It owns a program distribution operation serving primarily hotels at the Walt Disney World Resort Complex ("Disney World") in Florida. Each hotel receives The Disney Channel from Madeira and then distributes it to guest rooms using its own internal wiring.[8] This program distribution operation is an ancillary service provided to complement other guest services at Disney World.[9] The hotel guests incur no separate charge for the service during their temporary stay.[10]

6. Madeira pays the standard Disney Channel rate card subscriber fees for hotels. The hotels serviced by Madeira that are themselves Disney subsidiaries are debited by Disney for Madeira's charges. The few hotels serviced by Madeira that are not Disney subsidiaries are billed by Disney for Madeira's charges, as they are billed for rent and other services provided by Disney.[11]

7. In addition to the hotel rooms, there are 230 "backstage" sites at Disney World (break rooms for employees, office buildings and the like) to which Madeira provides The Disney Channel. Disney owns them all. In the future Disney plans to have Madeira service some residential subscribers, who would be neither hotels nor Disney owned entities.[12] At the present time, however, Madeira does not provide service to any residential subscribers.

8. The Disney Channel has made its service widely available to multichannel video program distributors, including satellite master antenna television, multichannel multipoint distribution service and direct broadcast satellite providers. The Disney Channel is carried by hotels near Disney World that receive their programming via satellite master antenna television systems unaffiliated with Disney or Madeira, and is also carried by the cable system serving the Orlando area.[13]

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[1] Disney's Petition was filed December 16, 1993 and placed on public notice January 26, 1994. On March 23, 1994 the Competition Division sent a letter of inquiry to Disney in response to the Petition ("March 23 letter"), to which Disney replied on April 22, 1994 ("April 22 letter"). Copies of these documents are available to the public in the Commission's Public Reference Center; 1919 M St., NW, Room 250; Washington, D.C. 20554.

[2] 47 C.F.R. Sections 76.1000-76.1003.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992). *See MM Docket No. 92-265: In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming and Carriage ("First Report and Order")*, 8 FCC Rcd 3359 April 30, 1993).

[4] See 47 U.S.C. Section 548.

[5] 47 C.F.R. Section 76.7(a)(1).

[6] Petition at 1.

[7] Petition at 3.

[8] There are 12,225 hotel rooms at Disney World that receive The Disney Channel from Madeira. 11,192 are at ten Disney-owned hotels and a Disney Vacation Club complex. The other 1033 are at two hotels that are not owned by Disney, but that are on land leased from Disney. *See* April 22 letter at 2.

[9] Petition at 3-4.

[10] Petition at 1, n.1.

[11] Petition at 4-5.

[12] April 22 letter at 2.

[13] Petition at 5.

III. DISCUSSION

9. The purpose of the program access rules is to ensure that programmers neither refuse to sell their programming to competing distribution systems nor discriminate against those competing systems in terms of rates or other conditions. The *First Report and Order* found that "[i]n enacting the program access provisions of the 1992 Cable Act, Congress expressed its concern that potential competitors to incumbent cable operators often face unfair hurdles when attempting to gain access to the programming they need in order to provide a viable and competitive multichannel alternative to the American public."[14] It further noted that "[t]he program access requirements of Section 628 have at their heart the objective of releasing programming to the existing or potential competitors of traditional cable systems so that the public may benefit from the development of competitive distributors."[15]

10."'[A] general rule, deemed valid because its overall objectives are in the public interest,' may fail to serve that interest if applied inflexibly."[16] Grant of a waiver is warranted where it would not "undermin[e] the purpose or policy which the rule was designed to further."[17]

11. The Bureau believes that grant of a conditional waiver is warranted here. Although the Madeira system is technically a cable system and while Madeira is technically a cable operator,[18] the unique circumstances of Madeira's Disney World operation as currently constituted and as set forth in Disney's unopposed Petition make clear that the Madeira system simply is not now, in reality and as a practical matter, the kind of distribution system the program access rules were designed to reach.

12. In the language of the *First Report and Order*, the Madeira system cannot in any meaningful way be viewed as a "traditional cable system," and Madeira cannot in any meaningful way be viewed as an "incumbent cable operator." Madeira's program offerings, including The Disney Channel, are provided almost exclusively to hotels, and to a small number of hotels at that. Those hotels provide the service exclusively to their guests, at no charge. The Disney Channel is widely available throughout the nation. In the Orlando area in particular, it is widely available in countless other hotels and in residences where its delivery is not at all dependent on Madeira. It is delivered through a variety of means, including alternative distribution systems.

13. Accordingly, we find it would not advance the public interest, in the current unique situation, to subject Madeira to the program access rules. Because grant of the waiver Disney seeks will not, under the current circumstances described, undermine the purpose the rules were designed to further, the Bureau believes that a grant of Disney's Petition is in the public interest. However, circumstances could change such that the Madeira system might become the kind of distribution system the program access rules were designed to reach. Madeira states that it plans to service residential customers in the future.[19] It is also possible that the number of non-Disney owned hotels Madeira services will increase.

14. We believe, therefore, that in order to insure that the public interest in enforcement of the program access rules continues to be served, it is necessary to condition our grant of this waiver. Thus, should Madeira begin residential distribution or expand the number of non-Disney owned hotels to which it provides service beyond the current two, we will require Disney to come before us and make a showing that, under such changed circumstances, continued operation of the waiver we today grant is in the public interest.

IV. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED, that Disney's Petition IS CONDITIONALLY GRANTED until such time as Madeira either begins residential distribution or adds other non-Disney owned hotels to its distribution system. IT IS FURTHER ORDERED that at such time Disney will again APPEAR BEFORE THE COMMISSION in an attempt to make a showing why continued validity of the waiver is in the public interest, should it wish the waiver to continue in force. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[14] *First Report and Order*, at Paragraph 9; 8 FCC Rcd at 3362.

[15] *First Report and Order*, at Paragraph 21; 8 FCC Rcd at 3365.

[16] *Columbia Communications Corp. v. FCC*, 832 F.2d 189, 193 (D.C. Cir. 1987), citing WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[17] *WAIT Radio v. FCC*, 418 F.2d 1153, 1160 n.21 (D.C. Cir. 1969).

[18] An argument could be made that Madeira's program distribution operation may *not* be a cable system. Our rules define a cable system as "provid[ing] cable service to multiple subscribers within a community." 47 C.F.R. Section 76.5(a). A subscriber, in turn, is defined as "a member of the general public who receives . . . programming . . . and does not further distribute it." 47 C.F.R. Section 76.5(ee). Since Madeira services the hotels, and since the hotels *do* further distribute the programming, there are arguably no true subscribers to Madeira's operation, so that the operation cannot be considered a cable system. However, Madeira does service some non-hotel sites and plans in the future to service residential customers. Moreover, Madeira's system consists, again in the definitionalh) language of 47 C.F.R. Section 76.5, "of a set of closed transmission paths and associated signal generation, reception and control equipment," and it uses public rights-of-way. *See* March 23 letter at 1; April 22 letter at 1-2.

[19] The Petition and the April 22 letter are silent as to when Madeira plans to initiate such service and as to how many residential subscribers may be contemplated.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
August 2, 1994

Released: August 3, 1994

Small Cable Business Association
c/o Eric E. Breisach
Howard & Howard
107 West Michigan Avenue, Suite 400
Kalamazoo, Michigan 49007-3956

Dear Mr. Breisach:

This letter is in response to your July 15, 1994 inquiry seeking clarification of certain provisions of the Commission's revised cable rate regulations regarding the unbundling of equipment charges from programming service charges. Specifically, you ask whether a cable system may unbundle and establish new charges following the initial date of regulation without incurring refund liability.

Under the Commission's rules, refund liability is calculated based on the difference between the pre-regulation charges and the sum of the new unbundled program service charges and new unbundled equipment charges established after the initial date of regulation.[1] As the Commission stated in its Third Order on Reconsideration:

> To not allow cable operators to factor in equipment charges could result in an operator being required to make a rate reduction that is greater than the maximum reduction required under application of the benchmark approach.[2]

Under these provisions, where a system was charging separately for program services and equipment, but such charges were not in compliance with the Commission's rules on the initial date of regulation, the operator's refund liability will be based on any difference between the sum of the old program service and equipment charges and the sum of the new, correctly unbundled charges.[3] Thus, cable systems will not incur refund liability because of unbundling to the extent there is no difference between the sum of the old equipment and programming service charges and the sum of the new permitted unbundled equipment and programming service charges as measured under the Commission's applicable forms. Further, since the unbundling of equipment in accordance with Commission requirements is effectively revenue neutral, equipment unbundling will not by itself produce refund liability.

Given that small operators are not required to make rate reductions during the transition period, small operators generally will face little or no refund liability if they voluntarily unbundle equipment charges in anticipation of regulation, or if they do so after being notified they are subject to regulation. Small operators would, however, face refund liability if their prices exceed March 31, 1994 levels with permitted adjustments under transition relief and price cap rules.[4] In addition, because they were not subject to the stay of rate regulation,[5] small operators that are not small systems may have refund liability under the original rate regulations that became effective September 1, 1993. Other systems would also be subject to refund liability to the extent charges otherwise exceed permitted levels.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

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[1] 47 C.F.R. § 76.942(a).

[2] *Third Order on Reconsideration* in MM Docket Nos. 92-266 and 92-262, FCC 94-40 at para. 104, 59 FR 17961 (April 15, 1994).

[3] 47 C.F.R. § 942(a); *Third Order on Reconsideration* in MM Docket Nos. 92-266 and 92-262, FCC 94-40 at para. 104, 59 FR 17961 (April 15, 1994).

[4] *See* 47 C.F.R. § 76.922(b)(4)(d)(e).

[5] The stay was lifted May 15, 1994. *See Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking* in MM Docket No. 92-266, FCC 94-38 at para. 228, 59 FR 17943 (April 15, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELLSOUTH'S PETITION FOR LIMITED WAIVER OF NETWORK DISCLOSURE RULES

CC DOCKET NO. 88-2

Released: August 4, 1994

On June 28, 1994, BellSouth petitioned the Commission for a limited waiver of the Commission's network disclosure rules requiring disclosure of new network interface specifications a minimum of six months prior to introduction of a new video service requested by the Federal Aviation Administration (FAA). BellSouth states that this waiver will be in the public interest and that the Commission has "good cause" to grant the waiver in light of the enhancements to public air traffic safety.

BellSouth states that the FAA asked BellSouth to provide a specialized video service that will improve the quality of video images appearing on air traffic control radar screens. BellSouth states that it is presently technologically capable of providing the requested service. The service, however, utilizes a network interface that has not been provided to date by BellSouth. BellSouth states that it made the required network disclosure on June 12, 1994 and the requested waiver will enable BellSouth to provide the service in a timely fashion without having to wait six months.

BellSouth states that no BellSouth CPE or enhanced services will be associated with this service. BellSouth requests that the waiver encompass all sites identified by the FAA in the BellSouth region requiring service before the end of the six month network disclosure period.

Interested parties may file comments on this petition for limited waiver **August 18, 1994**, and reply comments by **August 29, 1994**, with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition for limited waiver can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-638

In re Applications of

HEIDI DAMSKY	File No. BPH-880816MW
WEDA, LTD.	File No. BPH-880816NR
HOMEWOOD PARTNERS, INC.	File No. BPH-880816NU

For Construction Permit for a
New FM Station on Channel 247A
in Homewood, Alabama

Appearances

Lauren A. Colby, on behalf of Heidi Damsky; *Steven Diaz Gavin*, on behalf of WEDA, Ltd..; *John F. Garziglia* and *Louise Cybulski*, on behalf of Homewood Partners, Inc.

SUPPLEMENTARY INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: August 3, 1994; Released: August 12, 1994

Preliminary Statement

1. By *Memorandum Opinion and Order*, 8 FCC Rcd 6242 (1993), the Review Board remanded this proceeding for further hearing on the following issues:

a. To determine whether in it original application Homewood Partners, Inc. misrepresented facts or was lacking in candor when it certified that it was a general partnership composed of three general partners;

b. In the event the evidence adduced under (a), *supra*, shows that Homewood Partners, Inc. was, on the day of filing of its application a general partnership composed of three persons, to determine whether two additional persons subsequently acquired interests in Homewood Partners Inc. and to determine whether Homewood Partners, Inc. violated Section 1.65 of the Commissions Rules and Regulations by failing to report the acquisition of these interests by such persons;

c. To determine whether the principals of Homewood Partners, Inc. misrepresented facts or were lacking in candor when they testified at the hearing that the contributions of Franklin Hopkins and W. James Ellison were "loans" and were not, in fact, payments for interests held in Homewood Partners, Inc.;

d. To determine whether Homewood Partners, Inc., was financially qualified at the time that it certified its financial qualifications;

e. To determine whether Homewood Partners, Inc. made misrepresentations and/or lacked candor in pleadings filed before the Commission when it asserted that it was financially qualified;

f. To determine whether Homewood Partners, Inc. violated Section 1.65 of the Commission's Rules when it failed to disclose the existence of federal tax liens and other judgments against Homewood Partners, Inc.'s shareholder Adrienne Lee; and,

g. To determine, in light of the above issues, whether Homewood Partners, Inc. is fit to be a Commission licensee.

2. The evidentiary hearing on the added issues was held on November 15-17, 1993 and the record was closed on November 17, 1993. Proposed findings of fact and conclusions of law were filed February 8, 1994 and reply findings and conclusions were filed February 22, 1994.

Findings of Fact

Composition of HPI (Issues (a) - (c))
The Formation of the General Partnership

3. In early August 1988 Adrienne Lee called her attorney, Marvin L. Stewart, Jr., after several individuals had asked Lee to serve as a minority "front" for an application for the new FM station at Homewood, Alabama. HPI Ex. 15, ¶ 1. Lee was interested in pursuing the radio station venture, but not as a "front" for someone else., *Id.* Stewart advised Lee against pursuing any of those offers, and suggested that Willie Huff might be a good partner for her.. HPI Ex. 14, ¶ 1. Stewart knew Huff through the Chamber of Commerce and the discipleship ministry at their church. *Id.*, HPI Ex. 13, ¶ 2.

4. After receiving Lee's call, Stewart telephoned Lawrence J. Bernard, a communications attorney he was representing in a collection matter in Alabama. *Id.* Bernard told him that time was of the essence since there were only four or five days to get the application filed before the deadline of August 16, 1988. HPI Ex 14, ¶ 2. Bernard described the filing process and suggested that Lee form a partnership with individuals of her own choosing to apply for the allotment. HPI Ex. 14, ¶ 2; HPI Ex. 19, ¶ 3.

5. Stewart then called Huff, who was interested in participating in the venture (HPI Ex. 13, ¶ 1), and Stewart introduced Huff and Lee at his office (HPI Ex. 13, ¶ 3; HPI Ex. 15, ¶ 1). Operating under the time constraints, there were several conference calls within the next few days among Stewart, Bernard, Lee and Huff concerning preparation of the application, including the formation of a general partnership with Lee, Huff, and his wife, Deborah Huff, as the three general partners. HI Ex. 13, ¶ 3, HPI Ex. 19, ¶ 4. Bernard prepared the FCC application form and drafted a general partnership agreement, HPI Ex. 19, ¶ 5. Stewart coordinated the signing of the Homewood Partners Partnership Agreement and the application form at his office, and returned them to Bernard. HPI Ex. 13, ¶ 4; HPI Ex. 14, ¶ 8; PI Ex. 15, ¶ 3; HPI Ex. 19, ¶ 5. The Partnership Agreement signed by Mr. and Ms. Huff and Lee is in evidence in this proceeding as HPI Ex. 1A. Huff signed the FCC Form 301 application certifying that the applicant was

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELLSOUTH'S PETITION FOR LIMITED WAIVER OF NETWORK DISCLOSURE RULES

CC DOCKET NO. 88-2

Released: August 4, 1994

On June 28, 1994, BellSouth petitioned the Commission for a limited waiver of the Commission's network disclosure rules requiring disclosure of new network interface specifications a minimum of six months prior to introduction of a new video service requested by the Federal Aviation Administration (FAA). BellSouth states that this waiver will be in the public interest and that the Commission has "good cause" to grant the waiver in light of the enhancements to public air traffic safety.

BellSouth states that the FAA asked BellSouth to provide a specialized video service that will improve the quality of video images appearing on air traffic control radar screens. BellSouth states that it is presently technologically capable of providing the requested service. The service, however, utilizes a network interface that has not been provided to date by BellSouth. BellSouth states that it made the required network disclosure on June 12, 1994 and the requested waiver will enable BellSouth to provide the service in a timely fashion without having to wait six months.

BellSouth states that no BellSouth CPE or enhanced services will be associated with this service. BellSouth requests that the waiver encompass all sites identified by the FAA in the BellSouth region requiring service before the end of the six month network disclosure period.

Interested parties may file comments on this petition for limited waiver **August 18, 1994**, and reply comments by **August 29, 1994**, with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition for limited waiver can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-638

In re Applications of

HEIDI DAMSKY	File No. BPH-880816MW
WEDA, LTD.	File No. BPH-880816NR
HOMEWOOD PARTNERS, INC.	File No. BPH-880816NU

For Construction Permit for a
New FM Station on Channel 247A
in Homewood, Alabama

Appearances

Lauren A. Colby, on behalf of Heidi Damsky; *Steven Diaz Gavin*, on behalf of WEDA, Ltd.; *John F. Garziglia* and *Louise Cybulski*, on behalf of Homewood Partners, Inc.

SUPPLEMENTARY INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: August 3, 1994; Released: August 12, 1994

Preliminary Statement

1. By *Memorandum Opinion and Order*, 8 FCC Rcd 6242 (1993), the Review Board remanded this proceeding for further hearing on the following issues:

a. To determine whether in it original application Homewood Partners, Inc. misrepresented facts or was lacking in candor when it certified that it was a general partnership composed of three general partners;

b. In the event the evidence adduced under (a), *supra*, shows that Homewood Partners, Inc. was, on the day of filing of its application a general partnership composed of three persons, to determine whether two additional persons subsequently acquired interests in Homewood Partners Inc. and to determine whether Homewood Partners, Inc. violated Section 1.65 of the Commissions Rules and Regulations by failing to report the acquisition of these interests by such persons;

c. To determine whether the principals of Homewood Partners, Inc. misrepresented facts or were lacking in candor when they testified at the hearing that the contributions of Franklin Hopkins and W. James Ellison were "loans" and were not, in fact, payments for interests held in Homewood Partners, Inc.;

d. To determine whether Homewood Partners, Inc., was financially qualified at the time that it certified its financial qualifications;

e. To determine whether Homewood Partners, Inc. made misrepresentations and/or lacked candor in pleadings filed before the Commission when it asserted that it was financially qualified;

f. To determine whether Homewood Partners, Inc. violated Section 1.65 of the Commission's Rules when it failed to disclose the existence of federal tax liens and other judgments against Homewood Partners, Inc.'s shareholder Adrienne Lee; and,

g. To determine, in light of the above issues, whether Homewood Partners, Inc. is fit to be a Commission licensee.

2. The evidentiary hearing on the added issues was held on November 15-17, 1993 and the record was closed on November 17, 1993. Proposed findings of fact and conclusions of law were filed February 8, 1994 and reply findings and conclusions were filed February 22, 1994.

Findings of Fact

Composition of HPI (Issues (a) - (c))
The Formation of the General Partnership

3. In early August 1988 Adrienne Lee called her attorney, Marvin L. Stewart, Jr., after several individuals had asked Lee to serve as a minority "front" for an application for the new FM station at Homewood, Alabama. HPI Ex. 15, ¶ 1. Lee was interested in pursuing the radio station venture, but not as a "front" for someone else.. *Id.* Stewart advised Lee against pursuing any of those offers, and suggested that Willie Huff might be a good partner for her.. HPI Ex. 14, ¶ 1. Stewart knew Huff through the Chamber of Commerce and the discipleship ministry at their church. *Id.*, HPI Ex. 13, ¶ 2.

4. After receiving Lee's call, Stewart telephoned Lawrence J. Bernard, a communications attorney he was representing in a collection matter in Alabama. *Id.* Bernard told him that time was of the essence since there were only four or five days to get the application filed before the deadline of August 16, 1988. HPI Ex 14, ¶ 2. Bernard described the filing process and suggested that Lee form a partnership with individuals of her own choosing to apply for the allotment. HPI Ex. 14, ¶ 2; HPI Ex. 19, ¶ 3.

5. Stewart then called Huff, who was interested in participating in the venture (HPI Ex. 13, ¶ 1), and Stewart introduced Huff and Lee at his office (HPI Ex. 13, ¶ 3; HPI Ex. 15, ¶ 1). Operating under the time constraints, there were several conference calls within the next few days among Stewart, Bernard, Lee and Huff concerning preparation of the application, including the formation of a general partnership with Lee, Huff, and his wife, Deborah Huff, as the three general partners. HI Ex. 13, ¶ 3, HPI Ex. 19, ¶ 4. Bernard prepared the FCC application form and drafted a general partnership agreement. HPI Ex. 19, ¶ 5. Stewart coordinated the signing of the Homewood Partners Partnership Agreement and the application form at his office, and returned them to Bernard. HPI Ex. 13, ¶ 4; HPI Ex. 14, ¶ 8; PI Ex. 15, ¶ 3; HPI Ex. 19, ¶ 5. The Partnership Agreement signed by Mr. and Ms. Huff and Lee is in evidence in this proceeding as HPI Ex. 1A. Huff signed the FCC Form 301 application certifying that the applicant was

a general partnership with him and his wife and Lee as the only partners. HPI Ex 22. The application was filed on August 16, 1988. Tr. 1278.

6. During the time that the application was being prepared and filed, or shortly thereafter, Bernard advised Huff about the FCC's requirements regarding investors as opposed to active participants. HPI Ex. 13, ¶ 6; HPI Ex. 19, ¶ 6. Huff was interested in incorporating at some point in order to limit the exposure to liability. HPI Ex. 13, ¶ 7; Tr. 1452. He also wanted to bring in passive investors to help share the risk and fund the application. HPI Ex. 14, ¶ 4.

7. Bernard described to Huff and Stewart the possible formation of a corporation with two classes of stock -- voting and nonvoting -- so that passive investors might possibly participate in the venture. HPI Ex. 19, ¶ 6. This information was recounted in a letter to Stewart dated August 24, 1988. HPI Ex. 12. Bernard also advised that investors could be brought in at a later time by changing the form of the applicant entity to a corporation as they discussed and filing an appropriate amendment at the Commission. HPI Ex. 13, ¶ 2; HPI Ex. 19, ¶ 4. It was Stewart's understanding from Bernard that the partners at some time would have to determine their ultimate business entity which would allow them to bring in additional investors. HPI Ex. 14, ¶ 9.

8. Willie and Deborah Huff and Adrienne Lee all understood that their general partnership was comprised of just them and no one else. HPI Ex. 13, ¶ 10; HPI Ex. 15, ¶ 2 HPI Ex. 16, ¶ 1. Huff knew that the form of the entity would have to be changed in order to bring in investors. HPI Ex. 13, ¶ 9. As a general partnership, Homewood Partners could not bring in passive investors since there was not a provision in the partnership agreement under which to do so. *Id.* Despite the fact that discussions were held with potential investors, Homewood Partners operated as a general partnership until the incorporation, with Mr. and Ms. Huff and Lee making all of the substantive decisions. HPI Ex. 13, ¶ 10; HPI Ex. 15, ¶ 7.

Hopkins' and Ellison's Loans to the Partnership

9. Around the time the application was filed in August 1988, Huff told Franklin P. Hopkins about the radio deal he was working on with Homewood Partners. HPI Ex. 13, ¶ 8. Hopkins was looking for an investment (HPI Ex. 17, ¶ 2), and Huff told him that if there was a way possible to bring Hopkins in as an investor, Huff would try to do so (PI Ex.. 13, ¶ 8). Sometime between the filing of HPI's application, on August 16, and August 28, 1988, Huff asked Hopkins for a $1,200 check as a loan or refundable deposit to the general partnership. HPI Ex. 13, ¶ 3 : |8. At that time, Hopkins was not associated with the partnership in any way. HPI Ex. 17, ¶ 3. In making the loan, Hopkins : |e expressed an interest in wanting to become involved in the radio venture as an investor. *Id.* The $1200 check dated August 28, 1988 contains the notation "Ownership 20% of Homewood Partners." Damsky Ex. 5, p. 3. Hopkins put the notation on the check to reflect his desire to be brought in as an investor. Hopkins emphasized, however, that at the time he wrote the check, there was no agreement between Homewood Partners and himself as to what the check was for other than as a loan to the partnership. HPI Ex. 17, ¶ 5. Further, prior to incorporation, his only involvement in the venture was the loan of money. Tr. 1409.

10. Huff first heard the term "refundable deposit" from Bernard in the context of their discussions about how to acquire funds, since bringing passive investors into the general partnership was impossible under the Partnership Agreement. Tr. 1452-1453. Huff believes that, regardless of whether the money is called a loan or a refundable deposit, it is a loan, a note payable that could be refunded at a later date. Tr. 1453.

11. Hopkins recalls that after the application was filed, there was some talk about amending the partnership agreement or the application in order to bring in "some additional people somewhere down the road as investors." HPI Ex. 17, ¶ 4.

12. Stewart was also speaking to someone about becoming a potential future investor in the applicant. Stewart and Bill Ellison knew each other well from working together at the same law firm and from their church. HPI Ex. 14, ¶ 4; HPI Ex. 18, ¶ 4; Tr. 1290. Stewart encouraged Ellison to make a loan of $1,200 to the partnership. HPI Ex. 14, ¶ 9; Tr. 1290. Although Ellison "straddled the fence" for a while, Stewart persisted. Tr. 1290-1291. Stewart explained to Ellison that there was "no guarantee" that he would become an investor, but that if he did, Ellison "would most likely get an equity interest of 20%." HPI Ex. 18, ¶ 3.

13. Ellison wrote a check to the partnership on August 31, 1988 for $1,200, indicating "20% Interest Radio" in the memo line of the check. HPI Ex. 18, ¶ ¶ 3-4. No one advised Ellison to put the notation on the check. Tr. 1305. He wrote 20% because it was the amount of interest in the venture he was seeking should it ever come about. Tr. 1307. The notation referred to a potential ownership interest. Tr. 1317. In this regard, he told Stewart that he "would be interested in a 20% interest if it should become available." HPI Ex 18, ¶ ¶ 3-4. When Ellison gave the check to Stewart, Stewart told him that the check was a loan to the partnership. HPI Ex. 18, ¶ 7. Ellison knew that nothing was definite, but "if things materialized correctly |he| could be part of the group." HPI Ex. 18, ¶ 5. Ellison viewed the potential investment as strictly passive and has never had any intention of being active in the group. HPI Ex. 18, ¶ ¶ 6, 9. Ellison eventually wrote a second check to the partnership in the amount of $58.89. HPI Ex. 18, ¶ 7. It was also a loan and written in the same context as the check for $1,200. *Id.*

14. Around the time Ellison wrote the $1,200 check, he had an opportunity to briefly meet Willie Huff and Adrienne Lee at a meeting with Stewart at Najjar Denaburg, the law firm where Messrs.. Stewart and Ellison worked. HPI Ex. 18, ¶ 8. Ellison remained at the meeting less than five minutes and did not participate in any way. *Id.*

15. Stewart's role was initially as a contact person to assist Huff and Lee in putting together the radio station venture. HPI Ex. 14, ¶ ¶ 6, 7. At the time Stewart wrote an August 12, 1988 letter to Kelly Akers regarding the transmitter site, he had already initially spoken with Ellison about becoming a potential investor, and Huff had mentioned to Stewart that Hopkins might be interested as well. HPI Ex 14, ¶ ¶ 4, 7. Stewart listed Messrs. Hopkins' and Ellison's names on the Akers letter as receiving copies as a courtesy so they would be informed about what was going on. HPI Ex. 14, ¶ 7. At that point, neither of them had yet decided that he wanted to loan money to the partnership.

16. Prior to HPI's incorporation, there was never any written agreement or other understanding between Homewood Partners and Messrs. Hopkins or Ellison which defined, explained or created any relationship between the

partnership and those individuals. HPI Ex. 13, ¶ 10. They were never involved in the decisionmaking process of the partnership, and never undertook any participation or activity related to the partnership, other than the loan of funds. *Id.* Neither person held himself out as a partner or owner of Homewood Partners. *Id.* The three partners never regarded, held out to the world, implied or even suggested that Messrs. Hopkins and Ellison were partners in, or owners of, the partnership. HPI Ex. 13, ¶ 11; HPI Ex 15, ¶ ¶ 7-8; HPI Ex. 16, ¶ 3-4. The money advanced by Messrs. Hopkins and Ellison was at all times regarded by the partnership as either a loan or refundable deposit in anticipation that they may one day obtain an ownership interest. HPI Ex.15, ¶ 7.[1]

The Incorporation Process

17. HPI selected new communications counsel in early February 1991, which generally coincided with the release of the Hearing Designation Order (HDO) in this proceeding. Damsky Ex. 16, ¶ 3. HPI's new counsel, John F. Garziglia, of the law firm of Pepper & Corazzini, advised HPI, through Stewart that the decision to incorporate should be made as soon as possible so that an amendment certifying the applicant's financial qualifications could expeditiously be filed with the Commission. Damsky Ex. 16, ¶ 6. Once the decision to incorporate was made, Stewart suggested that Douglas McWhorter of his firm's business department draft the corporate papers. HPI Ex,. 14, ¶ 8.

18. During the next several days McWhorter, Stewart and Garziglia were in communication through a series of letters and telephone calls. Tr. 1615, 1634. Damsky Ex. 17. McWhorter drafted the articles of incorporation, bylaws and minutes of the meeting of incorporators and sent them to Garziglia for review with respect to Commission implications. Damsky Ex. 17. Both the draft minutes (Damsky Ex. 19) and the actual minutes which were signed on February 22, 1991 (Damsky Ex. 21) indicate that Messrs. Hopkins and Ellison were purely passive investors holding Class B nonvoting stock. Huff and Lee are the officers, and Mr. and Ms. Huff and Lee are the directors of the corporation and holders of Class A voting stock.

The Handwritten Ledger

19. Huff has maintained handwritten ledger sheets since about August 15, 1988, to track the partnership's financial transactions HPI Ex. 9; HPI Ex. 13, ¶ 12. Huff updated the ledger on an ongoing basis contemporaneously with occurring transactions although some entries on the ledger were not made on the exact day a given transaction occurred. HPI Ex. 13, ¶ 12; Tr. 1501-1502. Sometimes Huff would make errors in writing something down in the ledger, or would decide that a particular entry could be placed in a better order. This resulted in erasures throughout the ledger which he considers to be a normal part of keeping books. HPI Ex, 13, ¶ 12.

20. Damsky offered into evidence a Document Examination Report of Edwin A. Alford as Damsky Ex. 12. This report was identified during the comparative phase of this proceeding, but was rejected because the Presiding Judge ruled that the erasure in question did not pertain to Hopkins, as alleged, but rather to the correct date of the contribution by Lee. Tr. 1198. Alford's report focuses on the several places throughout the ledger where erasures have been made, and purports to identify and "reconstruct" the erased text. The previously erased text which Alford is able to identify is marked in blue pen on Damsky Ex 12, and the previous location of the erased material is marked with blue parenthesis. Damsky Ex. 12; Tr. 1179-1180.

21. At issue is the previously erased material at approximately the middle of page 5 of Damsky Ex. 12, which is the first page of the ledger. The erased material which has been reconstructed by Alford appears to consist of the following:

"8/29 cash	2.000
capital	2.000
Adrienn"	

The entry which has been written in its place is the following:

"8/28 cash	1.200
Note payable	1.200

Loan - Franklin Hopkins to Homewood Partners"

Damsky Ex,. 12, p. 5.

22. When questioned about the erased material concerning Lee's $2.000 contribution, Huff testified that after making the first two entries on the page, he had saved up four or five additional entries to record in the ledger. Tr. 1458. Huff explained that, when making entries, he might work with several pieces of paper, such as cancelled checks or other documents. *Id.* Huff testified that when making that particular group of entries he made a mistake as to the date of Lee's contribution. Huff initially recorded it in the ledger as having taken place on August 29, but Lee made her contribution on September 8, 1988. *Id.* This date is corroborated by a copy of Lee's cancelled check, dated September 2, 1988, and deposited on September 8, 1988, making her initial $2.000 contribution to the partnership. HPI Ex. 20, at Tab F, p. 1; HPI Ex. 21, ¶ 4.

23. Huff further testified that, when he realized the error, he erased Lee's entry and continued making entries in the correct chronological order, beginning with Hopkins' loan

[1] Although Ms. Huff did not use the terms "loan" or "refundable deposit" in her own testimony she cannot recall whether Mr. Huff called the funds "loans" when he described them to her. Tr. 1400. She is very clear, however, on her understanding that the funds were treated as "a potential interest in the partnership." HPI Ex. 16, ¶ 3. When faced with her deposition testimony concerning the word "interest," Ms. Huff acknowledged that there was a problem with her understanding of what "interest" means. Tr. 1399. Through her oral testimony, Ms. Huff clarified *her* definition of the word "interest" as "meaning that Franklin Hopkins and Bill Ellison were interested in, in becoming involved in the Homewood Partners ven-

on August 28.[2] Lee's contribution of $2,000 on September 2 is recorded at the bottom of the page where Huff moved it so that it would be in the correct chronological order. Tr. 1458, 1464.

24. Prior to the hearing session on the added issues, HPI Ex. 9 consisted of photocopies of the nine ledger sheets. It was admitted into evidence during the comparative phase of this proceeding. Upon a comparison of the first page of the ledger as photocopied for Alford's report in Damsky Ex. 12, with the first page of the ledger as photocopied for HPI Ex. 9, Huff pointed out that Damsky Ex. 12 does not show the last line on that page, and, therefore that Alford's report does not contain an exact copy of the first page of the ledger. Tr. 1463-1464. The last line of Lee's entry reads: "Adrienne Lee - 33.3% interest", which does not appear at all in Alford's report. HPI Ex. 9.

25. Huff also explained the alleged discrepancy between the $6,000 initial capitalization required by the Partnership Agreement ($2,000 from each of the three partners), and the $4,000 total amount in contributions made by the three partners in August and September 1988. HPI Ex,. 9, p. 1; Tr. 1514-1515. Each of the three $2,000 contributions anticipated by the Partnership Agreement was for a one-third interest in the partnership. The ledger indicates that Willie and Deborah Huff contributed $2,000 in capital on August 15, 1988, for a 66.67% interest, and Adrienne Lee contributed $2,000 in capital on September 8, 1988, for a 33.3% interest. HP Ex. 9. Huff testified that the rest of the money was contributed as it was needed, rather than all at once. Tr. 1514-1515. Since Huff planned on borrowing the money for his contribution from a line of credit, he wanted to wait until there were bills for the partnership to pay, rather than drawing the funds from the credit line and having it sit in the partnership's account while he paid interest on the borrowed funds. Tr. 1515. Additional contributions were made as needed in 1990 and 1991, and since the incorporation.

26. Upon order of the Presiding Judge, the original ledger sheets, on 8 1/2" x 11" lined yellow paper, were received into evidence as a supplement to HPI Ex. 9. Tr. 1797.

The Computer Disks

27. In October 1991, HPI was ordered to produce a hard computer disk and four floppy backup disks to Damsky for inspection, in response to a concern during the comparative phase of this proceeding about the veracity of HPI's handwritten ledger. Tr. 782. Huff earlier had testified that he had kept computerized records of when the partnership contributions were made in 1988 that would substantiate the accuracy of the ledger sheets. At the November 1993 hearing session, Huff testified that, at the time he turned over the hard disk and floppy backup disks to HPI's counsel for production to Damsky, he thought he had made the backup disks around the time of the filing of the original application, but he did not know exactly when the backup disks had been prepared. HPI Ex. 13, ¶ 14. Tr. 1476. He could not and did not read the disks before sending them to counsel because the hard disk that also was being produced was damaged. *Id.* Huff did not know what entries or data, if any, were on the hard disk or the floppy disks. *Id.*

28. Huff has used the Dollars and ense computer program to keep records and prepare reports for the general partnership and, after the incorporation, for HPI. HPI Ex. 13, ¶ 15. Dollars and ense is a financial management program using a double entry accounting system. Tr. 1481. At the time the application was filed, Huff was using Dollars and ense to keep records of his family's household expenses. HPI Ex. 13, ¶ 15. Tr. 1481. Huff created a directory titled "FMRadio" for the purpose of using Dollars and ense to maintain the financial records of the partnership, as a backup to the handwritten ledger. *Id.*; Tr. 1482. Based on the computer printout of the contents of the disks, which has been received into evidence as Damsky Ex. 14, the "FMRadio" directory was created on January 2, 1989, at 9:49 a.m., four-and-a-half months after the formation of the general partnership and filing of the application. Tr. 1476-1477; 1484-1885; Damsky Ex. 14, p. 4. There is also an "FMRadio2" directory which was created one minute later on January 2, 1989, at 9:50 a.m. *Id.* Huff does not hold himself out as an expert of the Dollars and ense program; he is merely a user of the program. Tr. 1490.

29. Damsky presented a witness who also is not an expert with the Dollars and ense program to testify at hearing about the program and the printout in Damsky Ex. 14. Henry Prentiss is a high school graduate with no college credits. Tr. 1535. While somewhat experienced with repairing computers he admittedly has no experience with the Dollars and ense program, since the first time he saw the program was to prepare the printout for Damsky Ex. 14. Tr. 1537, 1545-1546. In this regard, counsel for Damsky conceded prior to Prentiss taking the stand, that Prentiss does not know anything about the Dollars and ense program. Tr. 1489-1490. Since Prentiss has no knowledge as to what the information in the Dollars and ense program means, the only usefulness of Damsky Ex. 14 is Prentiss' testimony that this is what he was able to print off the floppy backup disks. Tr. 1546-1547.

30. Damsky Ex. 14 consists of 96 pages, including a one-page Declaration by Henry Prentiss, four pages listing the directories of each of the four floppy backup disks, a one-page cover sheet titled "FMRadio," a 38-page printout of the contents of the "FMRadio" directory, a one-page cover sheet titled "FMRadio2," and a 49-page printout of the "FMRadio2" directory. In reviewing the printouts of "FMRadio" and "FMRadio2," Huff noted that most of the figures are zeros which were part of the program when purchased. Tr. 1486.

31. Upon review of the "FMRadio" printout, Huff testified that the only data which appeared to be user-entered are the dollar amounts for the following, on page 7 of Damsky Ex. 14: cash on hand $1,723; capital stock $6,000; and notes payable $409. Tr. 1486-1487. Huff doesn't have independent recollection of making these entries, but he believes he could have made them when first familiarizing himself with the program and the business account. Tr. 1487. He stated that, at that time, he was just playing with the program and may have keyed in some information. Tr.

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ture in some form or fashion." Tr. 1395.

[2] There are no erasures associated with the entry for Ellison's loan on September 2. Damsky Ex. 12, p. 5; Tr. 1463, 1786.

1467, 1487-1488. Huff testified that the $6,000 was a logical figure for him to enter, since that was the total amount of capital contribution required by the Partnership Agreement, although that amount had not been contributed by the end of 1988. HPI Ex. 13, ¶ 16; Tr. 1487-1488. The $1,723 entry was also a logical approximate figure for him to enter based on the initial contributions and the expenses paid. Tr. 1487. Huff stated, though, that the $409 figure is completely illogical since the partnership had accepted $2,400 in loans from Messrs. Hopkins and Ellison. Tr. 1487-1488.

32. The only user-entered data in "FMRadio2" appears to be on page 47 of Damsky Ex., 14. Tr. 1491-1492. Pages 7 and 47 of Damsky Ex. 14 appear to be the same, except for the type size. *Id.* As of January 1989, the partnership had numerous expenses and accepted the two loans, none of which is reflected in the two files. Tr. 1493-1494. Huff testified that it is possible that he began using the computer actively for the partnership's financial data after the time these backup disks were created, and the files shown on the disks were merely his preliminary attempt to set up a computer data file for the partnership. HPI Ex. 13, ¶ 16.

33. Huff testified that the computer printouts in Damsky Ex. 14 are not an accurate reflection in any way of the partnership's activities up to January 2, 1989. HPI Ex. 13, ¶ 16. Huff does not have a printout that he ever made of data entered in the early part of 1989, and he concludes that he probably was not using the computer at that time to track the financial affairs of the partnership. *Id.*

34. There is a computer printout already in evidence in this proceeding which does accurately reflect the treatment of the funds from Messrs. Hopkins and Ellison as loans. In January 1991, Harold Gilchrist, Manager of the Alabama Small Business Investment Company, Inc. (ASBIC), requested financial information from the partnership for the previous four years, in connection with the partnership's attempt to obtain financial backing. Tr. 1466-1468. Damsky Ex. 9 is a printout of the data printed in 1991 and provided to Gilchrist. Tr. 1470.[3] At that point, Huff began keying in the data from the handwritten ledger and maintaining the computerized records of the applicant in earnest. Tr. 1466-1467.

35. Damsky Ex. 9 shows the $2,400 in loans from Messrs. Hopkins and Ellison on page 2 (using the page numbers in the lower right-hand corner), as "Notes Payable" under "Liability Accounts." Damsky Ex. 9; Tr. 1472-1474. The loans also appear on page 4, chronologically listed for 8/28/88 and 9/2/88. Damsky Ex. 9; Tr. 1473.

Financial Issues (Issues (d) - (f))

36. In adding the financial issues against HPI the Review Board expressed concern about the sufficiency of Lee's net liquid assets, the fact that Lee's financial statement does not list the lien and judgments filed against her, and the effect of the lien and judgments on her ability to make her contributions. *MO&O*, ¶ 21.

Analysis of Lee's Assets

37. HPI's business plan requires each of its five shareholders to purchase $15,000 work of stock. HPI Ex. 20, ¶ 2; HPI Ex. 21, ¶ 2. Lee knew that her $15,000 contribution would not be made in a lump sum and that Huff would periodically make cash calls on an "as needed" basis. HPI Ex 20, ¶ 2. This is consistent with Huff's explanation that, prior to the incorporation, partner contributions would be deposited in the partnership account as funds were needed, rather than having the funds sitting unused in the account while the contributor may have to pay interest on the money. See ¶ 28, *supra;* Tr. 1514-1515.

38. In February 1991, when Huff requested documentation of Lee's ability to make her $15,000 contribution, she gave him her financial statement dated December 31, 1990. Lee's financial statement is at HPI Ex. 20, Tab A. Lee prepared the financial statement herself, without the assistance of an accountant or any kind of a form to follow. HPI Ex. 20, ¶ 3; Tr. 1701. Lee began preparation of the balance sheet in December 1990, and updated the amounts of a couple of items on the statement before providing it to Huff in February 1991. Tr. 1740-1741. One of the amounts she updated was for the value of her Homewood Partners investment. Tr. 1741. She was aware that the statement would be included with HPI's loan application to the ASBIC. *Id.;* HPI Ex. 20, ¶ 3.

39. A copy of Lee's financial statement is at HPI Ex. 20, Tab A. The "cash-on-hand" item for $1,000 is Lee's line of credit on her Visa credit card. Tr. 1701-1702. The financial statement lists two insurance policies and what Lee believed to be their cash values. She clarified the names of the two insurance policies since they are not clear from the face of the financial statement. Tr. 1675-1679. Lee's written testimony is corrected so that HPI Ex. 20, ¶ 8 reads as follows:

> With respect to the "A.L. Williams" entry for $11,000 under "Assets" on my financial statement, it was an insurance policy through an agency called A.L. Williams, which changed to Massachusetts Indemnity and Life Insurance Company, and which is now called Primerica. At the time I prepared my financial statement, I believed the cash value of the A.L. Williams policy to be about $11,000.

Id. Her insurance agent told Lee the cash value of the A.L. Williams policy. Tr. 1702-1703. Her written testimony is also corrected so that ¶ 9 reads as follows:

> The "Cash value life insurance" entry for $10,000 on my financial statement reflects the cash value of another life insurance policy I had at that time through the Manufacturers Life Insurance Company. At the time I prepared my financial statement, I believed the cash value of the Manufacturers policy to be about $10,000.

Tr. 1675-1679.

[3] Damsky Ex. 9 was prepared by Huff *prior* to Damsky raising questions about the Ellison and Hopkins checks. Damsky's petition to enlarge issues against HPI was filed October 28, 1991.

40. There are also a couple of other clarifications and corrections to Lee's financial statement. Lee estimates that the value of her IRA investment in December 1990 was somewhere between $3,665.18 and $3,740.44, which are amounts shown in two monthly statements as HPI Ex. 20, Tab C, rather than the $3,373 figure shown on the statement HPI Ex. 20, ¶ 10. The dollar amounts for her home and real estate investment (rental property) should be switched, so that the value of the rental property is $50,000 and the value of her home is $45,000. HPI Ex. 20, ¶ 12. Lee testified that before giving the financial statement to Huff in February 1991, she updated the value of her Homewood Partners Investment to $4,500 as an approximation of her investment at that time. Tr. 1741. According to the chart of Lee's contributions at HPI Ex. 20, ¶ 14 and the copies of checks and money orders at Tab F, Lee contributed one $2,000 check in September 1988 and three $1,000 money orders in February 1991, for a total contribution as of February 1991 of $5,000.

41. Lee also has had access to a $17,000 home equity line of credit on her home. HPI Ex. 20, ¶ 13; Tr. 1706-1707. As of December 1990, the outstanding balance was about $5,000 leaving $12,000 available for withdrawal. HPI Ex 20, ¶ 13 and Tab A; Tr. 1706-1707. The $5,000 balance is shown on her financial statement as a personal liability, but the line of credit itself is not shown as an asset, as it should be shown. HPI Ex. 20, ¶ 13. Although Lee has always had the ability to rely on the home equity line of credit if necessary, she has never relied on it in order to make a contribution to the applicant. *Id.* Other than the balance on the line of credit, there are no mortgages on her home or rental property. Tr. 1706-1707.

42. As of February 1991, Lee owned 66% of Avenue of Homes, Inc., her real estate consulting firm, and her daughter owned 34% of the company. HPI Ex. 20, ¶ 4; Tr. 1695. That is also the equity split today. *Id.* Lee considers herself as owning 66% of the business "on the record," but she put everything into the company, and is giving her daughter 34%. Tr. 1712. Under the "Business Assets" portion of her financial statement Lee has listed $30,000 in broker's commissions and $12,000 personal sales commissions, which represent income of Avenue of Homes, Inc. for sales that Lee made in 1990. HPI Ex. 20 Tab A; Tr. 1711-1713. Lee is a broker, but her daughter is not Tr. 1713. Her daughter's sales commissions are not included in the $12,000 figure. Tr. 1711.

43. Lee's balance sheet erroneously included her corporation's business expenses as part of her personal liabilities. The money for those expenses comes out of the business. Also, the entries under "Personal Liabilities" for the automobile lease and car insurance should not be included because the auto lease was in Ms. Lee's husband's name and the auto insurance is a personal expense, not a liability. *Id.* Excluding these business expenses and the other erroneous entries, Lee's financial statement shows personal assets of approximately $166,873 (plus the $12,000 line of credit available), and personal liabilities of $6,000. Tr. 1715-1716.

44. Huff reviewed Lee's financial statement, and based on that review as well as his personal knowledge about her standing as a businesswoman in the community and someone who was active in community affairs, he was sure that she could afford to make the capital contributions required of her. HPI Ex. 21, ¶ 2. Huff knew that Lee owned two-thirds of her real estate company, Avenue of Homes, Inc., HPI Ex 21, ¶ 3.

45. Lee also provided Huff with a memorandum dated February 15, 1991, on the letterhead of Avenue of Homes, Inc., as additional assurance of her ability to make her contributions. HPI Ex. 20, ¶ ¶ 4-6; HPI Ex. 21, ¶ 3. The February 15, 1991 memo pledges to HPI the commissions from the sales of four homes, earmarked for the payment of legal fees soon to be incurred in the further prosecution of the application. HPI Ex. 20, Tab B. Lee wanted to give HPI a pledge of specific commissions from contracts she had pending at the time, but they were not the only commissions that she could use to fund her contributions. HPI Ex. 20, ¶ 5. The first and fourth closing occurred, with commissions totaling $6,650. HPI Ex. 20, ¶ 6. The second and third contracts listed in the memo did not close. *Id.* Although Huff did not rely on the memo to assure himself, on behalf of HPI, of Lee's overall financial ability, it did provide a specific source of funds from among the five shareholders to cover the increasing legal expenses in light of the just-released HDO. HPI Ex. 21, ¶ 3.

The Lien and Judgments

46. Since HPI certified in March 1991 that it was financially qualified, there have been one federal tax lien and two state court judgments against Lee outstanding at various times throughout the period. An earlier federal tax lien, referenced in the Review Board's MO&O at ¶ 17(a), was filed in November 1987 and released in September 1990 after the taxes were paid. This was well before the HDO specified the financial issue against HPI, and well before HPI amended its application to certify its financial qualifications. The second tax lien and one of the judgments resulted from private family misunderstandings and disagreements between Lee and her husband concerning whose responsibility it was to make certain payments. HPI x. 20, ¶ ¶ 16-24, 27-28.

47. Lee has left the preparation of tax returns to her husband and their accountant. Tr. 1729-1730. If there were extensions to be filed, it was worked out by her husband and the accountant. *Id.* Lee stated that if it had been brought to her attention that they owed taxes, she believes they would have been paid. *Id.* The Lees' joint tax returns for tax years 1985 and 1986 were filed, pursuant to filing extensions requested by their accountant, on December 31, 1987. HPI Ex. 20, ¶ 17. Lee left the payment of the taxes to her husband, but they disagreed as to how to divide the responsibility of paying the taxes. *Id.*

48. Although the Review Board's MO&O at ¶ 17(b) refers to a federal tax lien, it was actually a levy. The Internal Revenue Service filed a "Notice of Levy" in the amount of $3,262.94, on or about March 24, 1991 against Lee for nonpayment of taxes for tax years 1985 and 1986. HPI Ex,. 20, ¶ 18 and Tab G. The Notice was directed to the City of Homewood for withholding Lee's salary as a member of the City Council. *Id.* None of her salary was ever withheld and the amount owed to the IRS was paid in full, resulting in a "Release of Levy" dated May 22, 1991.. *Id.* Lee testified that the entire matter was purely a result of ongoing misunderstandings and disagreements with her husband over the handling of the family finances HPI Ex. 20, ¶ 19. It was not a case of being unable to pay the taxes, but rather a family dispute about financial responsibilities. *Id.*

49. It was the same situation with the First Alabama Bank judgment. On May 12, 1988, a "Certificate of Judgment" for $4,045.87 was filed in Jefferson County District

Court against Lee in favor of First Alabama Bank. HPI Ex. 20, ¶ 20 and Tab H. Lee and her husband each had a personal loan through First Alabama Bank, and they were making their respective payments on the loans. HPI Ex 20, ¶ 20. The loans were consolidated, Lee believes in 1985, but only her name was listed on the consolidated loan instead of both their names. *Id.* Lee understood that her husband would contribute payments toward the consolidated loan, but he did not follow through on his responsibility. *Id.*

50. A "Process of Garnishment" was filed on May 25, 1988 against Lee for the garnishment of her salary at Avenue of Homes, Inc., although none of her salary was withheld because she paid to First Alabama Bank what she thought was the full amount owed. HPI Ex. 20, ¶ 21. Lee believed the matter had been settled because a "Garnishee Release" was filed on September 9, 1988 by the Bank's attorney, releasing Avenue of Homes, Inc., as the garnishee from the "Process of Garnishment" and indicating that the garnishment was being released. HPI Ex. 20, ¶ 21 and Tab H.

51. Lee was shocked to learn three-and-a-half years later, in early March 1992, that First Alabama Bank had filed another "Process of Garnishment" for $1,754.57 against her for the garnishment of money from her checking and savings accounts. HPI Ex. 20, ¶ 23. The renewed Garnishment, filed February 20, 1992, referenced the Bank's 1988 judgment had credited her with paying only $2,500 of the amount owed. *Id.* Lee had only recently opened checking and savings accounts at First Alabama Bank, from which funds were garnished. *Id.*

52. Lee could not locate documentation of her payment of the balance of the judgment, for which she was not being credited. HPI Ex. 20, ¶ 24. She wrote to a bank official explaining the matter and, ultimately, paid the balance of the garnishment in full. *Id.* A "Full Satisfaction of Recorded Lien" was filed on September 8, 1992. HPI Ex. 20, ¶ 24 and Tab H. Lee testified that it was the personal disagreement between her and her husband which led to the Bank obtaining the judgment, and she regrets allowing a private family matter to get in the way of promptly paying off the consolidated loan. HPI Ex. 20, ¶ 22. Lee was never financially unable to make the required loan payments. *Id.*

53. The other judgment against Lee pertained to some tapes ordered by her former partner in her real estate company, who is now deceased. HPI Ex. 20, ¶ 25. On October 12, 1985, a "Certificate of Judgment" for $1,477.46 was filed in Jefferson County District Court against Lee by Services International. *Id.* at Tab I. Services International was a local company from which Lee's business partner, Virginia Elliott, had ordered, through Avenue of Homes, Inc., some motivational tapes for her use. *Id.* Lee thought the bill for the tapes had been paid years ago. *Id.* She recalls looking into the matter at the time she learned of the judgment around late 1985 and getting the impression at the time that the bill already had been paid. *Id.*

54. When the matter was brought to Lee's attention again through this proceeding, she again inquired into the status of the judgment and was initially told that the bill apparently had not been paid. HPI Ex. 20, ¶ 26. Through Lee's subsequent telephone calls with Success Motivational Institute, the company through which Services international acquired the tapes, she was referred to Great Southwestern Acceptance Corp., a collection agent for Success Motivational Institute. *Id.* Finally, Lee was referred back to the owner of the former Services International company in Birmingham, who told her that, according to his records, the tapes were paid for and he sees no reason for the outstanding judgment to be on file with the local court. *Id.*

55. None of the matters discussed above adversely impacted Lee's ability to not only meet, but exceed, the contributions to the applicant that were required of her. HPI Ex., 20, ¶ ¶ 14, 27-29; HPI Ex. 21, ¶ ¶ 4, 7. As of October 4, 1993, Lee's contributions totaled $20,000. Lee testified that she often used cash to purchase cashiers checks or money orders which she then gave to Huff for deposit. HPI Ex. 20, ¶ 14. The record of her payments to the applicant, first to the general partnership and then to the corporation, is set forth below:

Check #	Date	Amount	Payee
3071	9/2/88	$ 2,000.00	Homewood Partners
3628	2/18/91	[$ 1,900.00][4]	Cash (used for money orders listed next)
Three money orders	2/18/91	$ 3,000.00	Homewood Partners
3707	7/16/91	$ 4,000.00	Cash (notation on back re: cashiers check)
3726	8/7/91	$ 400.00	SouthTrust Bank
Bank check	9/18/91	$ 4,000.00	SouthTrust Bank (notation on back re: cashiers check)
3829	1/3/92	[$ 2,388.75]	Adrienne F. Lee (portion used to buy cashiers check)
3830	1/3/92	[$ 1,144.50]	Adrienne F. Lee (portion used to buy cashiers check)
3857	1/9/92	[$ 1,000.00]	Adrienne Fouther-Lee (portion used to buy cashiers check)
	1/24/92	$ 4,000.00	Cashier's check
224[5]	10/4/93	$ 2,600.00	Homewood Partners
	Total:	$20,000.00	

HPI Ex. 20, ¶ 14 an Tab F; HPI Ex. 21, ¶ 4. Tr. 1680-1685.

[4] The bracketed items are shown for clarity only, and are not added toward the $20,000 total.

[5] This check was drawn on Lee's personal checking account at AmSouth Bank.

56. Lee testified that the tax levy and judgments had no impact on her financial ability to make her contributions. HPI Ex. 20, ¶ ¶ 27-29. Within less than two months after the federal tax levy for $3,262.94 was filed in March 1991, she paid it in full. During that general time period, Lee also paid $3,000 to HPI in February 1991 and another $4,000 in July 1991. As for the First Alabama Bank judgment, Lee paid in full garnishment in September 1992, after unsuccessfully disputing the validity of the claim. There were no requests to Lee for contributions to HPI between the times of her $4,000 contribution in January 1992 and her $2,600 contribution in October 1993. Finally, Lee was told that it was apparently an error that the Services International judgment was still on file after so many years.

57. Lee reached and exceeded her $15,000 commitment to HPI with her $4,000 contribution in January 1992. HPI Ex. 20, ¶ 15. She testified that she is fully capable of meeting future cash calls to HPI as needed, and she remains committed to doing so. *Id.*

58. Lee testified that she believes the levy and judgments had absolutely no impact on HPI's financial qualifications or on her ability to meet her financial requirements. HPI Ex. 20, ¶ ¶ 27-29. Huff testified that he was fully aware of these matters and he was confident that they had never adversely impacted her ability to make all of her required contributions to HPI. HPI Ex. 21, ¶ 5. He understood that the levy and judgments did not reflect an inability of Lee to meet her financial commitments, whether to HPI or elsewhere. *Id.*

59. Harold Gilchrist, Manager of ASBIC, has provided a Declaration in this proceeding stating that even if he had known about Lee's family financial matters before issuing the ASBIC's February 1991 loan commitment letter, it would not have made any difference to his determination to issue the letter. HPI Ex. 27, ¶ ¶ 5, 7. At the time of his February 1991 letter, Gilchrist was well aware of Lee's ongoing real estate business, as well as her overall character as a businesswoman and as someone who has been, and continues to be, extensively involved in the local community. *Id.* He would not have doubted Lee's ability to contribute her share of funds pursuant to the business plan submitted to him as part of HPI's loan application. *Id.*

60. Further, Gilchrist testified that the ASBIC occasionally encounters and is understanding toward similar situations with small businesses seeking to borrow money. Tr. 1602. Before a loan is ultimately approved, a final review is made of the applicants to assure that all unpaid debts are cleared. *I d.* However, that process had not occurred with HPI because its loan is not yet in the final stages of processing. Tr. 1602, 1604.

CONCLUSIONS

Issues (a) - (c)

61. On August 16, 1988, Homewood Partners filed an application with the Commission certifying it was a general partnership composed of three general partners, Willie Huff, Deborah Huff, and Adrience Lee. A petition to amend this application was filed on March 8, 1991 which substituted a two-tiered corporation (HPI) for the general partnership. The three original partners remained as the voting stockholders and two other individuals, Franklin Hopkins and James Ellison, were added to the application as non-voting stockholders. Each of the five stockholders holds a 20% equity interest in HPI. The misrepresentation and Section 1.65 issues specified in the Board's remand focuses on the status of Hopkins and Ellison prior to the March 1991 amendment, namely, whether they were principals of the partnership either at the time of certification of the application or whether they subsequently acquired interests in the partnership. The Board placed the burdens of proceeding and proof on issues (a) to (c), as well as the remaining designated issues, on HPI. The record convincingly establishes that HPI has fully met the burden and the issues are resolved favorably to HPI.

62. Issue (a) calls for a determination whether in its original application, HPI misrepresented facts or was lacking in candor when it certified that Mr. and Mrs. Huff and Lee were the sole partners. The record conclusively establishes that the listed partners were the sole partners and that the certification was truthful.

63. At the time of the filing of the application, there were discussions between the three partners and their Washington counsel concerning bringing in passive investors. However, because of time constraints, the partners agreed with the advice of Washington counsel that the quickest way to proceed was to form a general partnership and amend the application later to bring in investors. In this regard, Washington counsel advised that investors could be brought in by changing the form of the applicant entity to a two-tiered corporation and filing an appropriate amendment. The three partners also knew that the Partnership Agreement would not allow them to bring in investors. The record establishes that the partners fully comported with the limitations imposed by the partnership structure. In sum, at the time of the filing of the application on August 16, 1988, the partnership was composed solely of the three general partners. There is no evidence in the record that either Ellison or Hopkins held an interest in the general partnership. In this connection, Ellison and Hopkins' agreement to loan money to the partnership occurred *after* the filing of the application.

64. Issue (b) seeks a determination whether subsequent to the filing of the application Ellison and Hopkins acquired interests in the partnership and whether HPI violated Section 1.65 of the Rules by failing to report such acquisitions. HPI, the successor to Homewood Partners, was incorporated in February 1991. Hopkins and Ellison each acquired a 20% non voting equity interest in HPI. The record establishes that prior to incorporation neither Hopkins or Ellison had an ownership interest in the applicant. This conclusion rests on the uncontradicted sworn testimony of the five shareholders and their local counsel, Marvin Stewart. The Presiding Judge has had an opportunity to observe these witnesses and finds their testimony forthcoming, candid and entirely believable. Their conclusion is reinforced by the complete absence of evidence showing any indicia of ownership. Thus, there was no written agreement or oral understanding between Homewood Partners and/or its principals and Hopkins or Ellison which defined, explained or created any relationship between the partnership and those individuals. Further, Hopkins and Ellison were never treated as partners or involved in the decisionmaking process. In addition, the three partners never regarded, held out to the world, implied or even suggested that Hopkins and Ellison were partners in, or owners of, the partnership. Moreover, there were no agreements or understandings for any future ownership in the corporation by Hopkins or Ellison. As will be more fully discussed under issue (c) the money advanced by Hopkins and Ellison was at all times regarded by the

partnership as either a loan or refundable deposit in anticipation that they may one day obtain an ownership interest. In this regard, the only document before the incorporation was the Partnership Agreement which does not provide for any investors or for any other partners. Rule 1.65 is, therefore, inapplicable since no substantial change in the composition of the entity occurred until incorporation which was reported as required by the Rule.

65. Issue (c) seeks a determination whether HPI's principals testified truthfully when they asserted that the contributions of Hopkins and Ellison were loans rather than payments for ownership interests in HPI. In adding issue (c) and the preceding issues, the Board focused on notations on the checks written by Hopkins and Ellison, the erasures in HPI's ledger kept by Huff, and the contents of Huff's backup computer disks which were thought to contain data reflective of HPI's transactions. A review of these matters does not alter the conclusion that the Hopkins and Ellison payments were loans and that no ownership interest in the partnership was conveyed.

66. The $1200 check from Hopkins to HPI dated August 28, 1988 contains the notation "Ownership 20% of Homewood Partners." The $1200 check from Ellison to HPI dated August 31, 1988 states "20% Interest Radio" in the memo line of the check. Hopkins and Ellison have testified that the notations did not signify a present ownership interest or even the guarantee of a future ownership interest. On the contrary, the notations referred to a potential future interest if and when a corporation might be formed so that investors could be admitted. Indeed, the General Partnership Agreement precluded other partners or investors. The general partners and local attorney, Stewart, have presented sworn consistent testimony on this point. There is no evidence in the record which contradicts their sworn testimony. As recited, *supra*, the Presiding Judge has had a full opportunity to observe the witnesses' veracity and has reached positive credibility findings based on that observation. Moreover, there is no possible motive for fabricating the purpose of the checks. The record makes plain that Hopkins and Ellison viewed the potential investment as strictly passive and never had any intention of being an active participant. Needless to say, such passive participation would have no bearing on the comparative posture of the parties. The fact that HPI properly amended its application to include Hopkins and Ellison when it made the decision to incorporate (long before Damsky raised the charges about the checks) offers proof positive that there was no intent or purpose to conceal their investments.

67. Turning to the erasures in HPI's handwritten ledger, the record makes plain that the erasures were the result of Huff's diligence in keeping accurate, chronological records of the applicant's financial transactions. They were never made to cover up --or obliterate-- any suspicious clues about the loans paid by Hopkins and Ellison. The loans were clearly treated as notes payable in the ledger. In this regard, as recited in Findings 21-23, *supra*, the erased material which has been reconstructed by Damsky's expert witness, Edwin Alford, concerns the substitution of an entry for Hopkins for an entry for Lee. As explained by Huff, Lee's entry was erased because it was not chronologically correct. The Hopkins entry was substituted because his loan was made on August 28, 1988. Lee's contribution which was made on September 2, 1988 was therefore moved to the bottom of the page. Unfortunately, the first page of the ledger as photocopied for Alford's report in Damsky Ex. 12 does not have the last line containing the entry "Adrienne Lee - 33.3% interest."[6] The credibility of Huff's explanation is buttressed by the fact that there are no erasures associated with the entry for Ellison's loan on September 2.

68. With respect to the backup computer disks it is now clear that they were created in January 1989. Also, the floppy backup computer disks contain incomplete data and do not accurately reflect HPI's financial transactions. See Findings 27-33. Thus, the computer disc has no probative value. There is, however, a computer printout in evidence which accurately reflects the treatment of the funds as loans from Hopkins and Ellison. See Damsky Ex. 9. Damsky Ex 9 which keys in data from the handwritten ledger was prepared by Huff in 1991 and provided to Harold Gilchrist, Manager of the Alabama Small Business Investment Company, Inc. Importantly, it was prepared *prior* to Damsky raising questions about the Ellison and Hopkins checks. In sum, the record is devoid of any evidence of misrepresentation, lack of candor, or violation of the reporting rule concerning the status of Homewood Partners as a partnership with only three general partners until its incorporation, or the treatment of the loans from Hopkins and Ellison.

Financial Issues (Issues (d)-(f))

69. The second set of issues pertain to HPI's financial qualifications at the time it amended its application in March 1991 to change the applicant entity to a corporation and to certify its financial qualifications. In question is whether Adrianne Lee had sufficient resources to make her capital contributions to the applicant in light of two tax liens and two court judgments against her. The findings conclusively establish that Lee did indeed have the resources to not only meet but exceed, her required contributions and that HPI truthfully certified it was financially qualified. Further, the liens and judgments had no impact on her financial obligations to HPI or on HPI's financial qualifications. Finally, HPI was not obligated to report the existence of the liens and judgments.

70. HPI's business plan requires each of its five shareholders to make a capital contribution of $15,000. In assessing Lee's capabilities of meeting the required capital contribution, Huff relied on Lee's financial statement dated December 31, 1990. Lee also provided him with the February 15, 1991 memorandum listing examples of the types of commissions she expected to earn. In this regard, Huff knew that Lee owned two-thirds of her real estate company and was active in community affairs. Based on his review of her financial statement and his personal knowledge about her background, he was confident she could make her $15,000 capital contribution. As of HPI's financial certification in March 1991, Lee already had contributed $5,000 to the applicant. A review of Lee's financial statement amply demonstrates that Huff's confidence was jus-

[6] The last line does appear in HPI Ex. 9. The original ledger sheets were received into evidence as a supplement to HPI Ex. 9.

tified. Lee's financial statement shows personal assets of approximately $166,873 (plus the $12,000 line of credit available) and personal liabilities of $6,000. Lee's ability to make the required capital contribution is further demonstrated by the fact that as of October 4, 1993, Lee's contributions totaled $20,000. Consequently, it is concluded that HPI was financially qualified at the time it certified its financial qualifications and that HPI has been entirely truthful in asserting it was financially qualified.

71. Since HPI certified in March 1991 that it was financially qualified, there have been one federal tax lien and two state court judgments against Lee at various times throughout the period. An earlier federal tax lien, referenced in the Review Board's MO&O at ¶ 17 (a) was released well before HPI certified its financial qualifications. The liens and judgments were not listed as liabilities on Lee's financial statement because at the time she prepared the statement she believed in good faith they had been resolved. The record makes plain that the tax matters and court judgments involved *de minimis* amounts of money and did not affect Lee's ability to meet and exceed her required contributions to the general partnership and, after incorporation, to HPI. Further, the indebtedness arose not because of an inability to pay, but were the results of ongoing private disagreements between Lee and her husband. No evidence has been offered contradicting Lee's explanations concerning the liens and judgments.

72. Lee's liens and judgment at issue were not required to be reported to the Commission because they did not constitute a substantial or significant change in the information previously reported as to HPI's financial qualifications. Lee's personal financial matters had absolutely no impact on HPI's financial qualifications.[7] In this regard, the Review Board has held that the mere existence of a tax lien is not necessarily reportable pursuant to Section 1.65. *Azalea Corp.*, 48 FCC 2d 95, 100 (Rev. Bd. 1972), *citing*, *Advanced Electronics*, 5 RR 2d 980, 982 (Rev. Bd. 1965) ("the filing of a federal tax lien, standing along, does not necessarily reflect upon the qualifications of an applicant"). Similarly, the Commission held in *Cosmopolitan Enterprises, Inc.*, 8 FCC Rcd 849 (1967), that "not all civil actions and judgments against a person who has agreed to lend money to an applicant must be reported. Rule 1.65 is concerned only with substantial and significant changes, and only these have to be reported." In *Cosmopolitan*, the applicant did not violate Section 1.65 by not reporting a $29,668 judgment against a person who pledged to loan the applicant $10,000 and contribute to a $25,000 bank account to secure a bank loan. Accordingly, the financial issues are resolved in HPI's favor.

Accordingly, IT IS ORDERED, That unless an appeal from this Supplemental Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[8] the grant of the application of Homewood Partners, Inc. for a construction permit for a new FM station on Channel 247A in Homewood, Alabama IS AFFIRMED; and the applications of Heidi Damsky and WEDA, Ltd. ARE DENIED.[9]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

[7] HPI is relying for its financing on a letter dated February 18, 1991 from Harold Gilchrist, the manager of the ASBIC. Gilchrist has made clear that knowledge of Lee's personal financial matters prior to the issuance of the February 1991 financial assurance letter would not have impacted his decision to issue the letter. HPI Ex. 27, ¶ 4-7. Similarly, matters which arose after the issuance of the February 1991 letter to HPI had no impact on Gilchrist's determination concerning Lee's ability to make her required contribution to HPI. *Id.* at ¶ 7.

[8] In the event exceptions are not filed within 30 days after the release of this supplemental initial decision, and the Commission does not review the case on its own motion, this supplemental initial decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

[9] The Commission's Public Notice (FCC 94-41, released February 25, 1994) freezing Comparative Proceedings provides: "Where a proceeding has been remanded to an ALJ for consideration of a basic qualifications issue, the ALJ will issue a supplemental initial decision addressing the remanded issue."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT Corporation Transmittal No. 39

COMSAT Mobile Communications

ORDER

Adopted: August 3, 1994; Released: August 4, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On June 21, 1994, COMSAT Corporation - COMSAT Mobile Communications (COMSAT) filed Transmittal No. 39 to introduce a temporary service called "Temporary Standard A Telephone Study Service" (Temporary Voice Service).[1] Transmittal 39 is scheduled to take effect on August 5, 1994. Seven Seas Communications, Inc. (Seven Seas) filed a petition to reject or suspend and investigate Transmittal 39, and COMSAT filed a reply.

2. COMSAT describes Temporary Voice Service as an offering to examine the price elasticity of ship-to-shore Standard A voice traffic in the Indian Ocean and Pacific Ocean regions by giving a discount to customers enrolled in the Customer Discount Plan[2] The customer is allowed to choose two destinations, anywhere in the world, for which it will receive an additional discount of $0.75 per minute on all Standard A calls terminating in these two destinations. The offering is limited to specific time-of-day periods. The customer may choose two United States area codes, a United States area code and a foreign country code, or two foreign country codes. The Temporary Voice Service will be offered from the effective date of the tariff through September 30, 1994.[3]

3. Seven Seas contends that COMSAT's offering is unreasonably discriminatory because it targets potential ship-to-shore customers in the fishing industry to the exclusion of other maritime vessels, in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). Seven Seas asserts that the time period covered by the COMSAT offering coincides with the second United States fishing season, which begins August 15 and ends around September 30. Seven Seas also contends that COMSAT conducted a similar test of price elasticity for Standard A Service under Transmittal No. 15 and that it is not apparent what COMSAT could learn additionally from conducting another study. Finally, Seven Seas asserts that the proposed offering is not cost supported.[4]

4. COMSAT replies that its temporary offering is available to all enrollees in its Customer Discount Plan who notify COMSAT of their interest to participate. COMSAT asserts that the filing is intended to enable COMSAT to respond to strong price competition in the fishing industry. In addition, COMSAT asserts that its costs justify the proposed rates.[5] To support its claim, COMSAT filed additional cost support information.[6]

5. We have reviewed the tariff transmittal and additional information filed by COMSAT, the petition to reject or suspend and investigate the tariff filed by Seven Seas, and COMSAT's reply. We conclude that no compelling argument has been presented that these tariffs are patently unlawful so as to warrant rejection or that an investigation is warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject or to suspend and investigate COMSAT Mobile Communications Tariff F.C.C. No. 1, Transmittal No. 39 filed by Seven Seas Communication, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] Standard A Service is an analog, voice grade telecommunications service in the Atlantic, Pacific, and Indian Ocean regions between ship earth stations and other stations.

[2] The Customer Discount Plan is available to customers who achieve a certain level of service for each year it remains in the plan. The plan requires a minimum commitment of five years. COMSAT Transmittal No. 41 (filed June 30, 1994).

[3] COMSAT Transmittal 39, Description and Justification at 1.

[4] Sevens Seas Petition at 2.

[5] COMSAT Reply at 3-4.

[6] Letter from COMSAT to Secretary, FCC (Aug. 2, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

U S West Communications — Transmittal No. 490

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: August 3, 1994; Released: August 4, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On June 6, 1994, U S West Communications (U S West) filed Transmittal No. 490 to change references in its tariff from "pay telephone coin services" to "pay telephone sent-paid services." These changes will allow U S West to broaden the station controlled tariff language to include cash mediums other than tangible coins, e.g., a prepaid card which will be called "Telecard." Interexchange carriers (IXCs) accepting the station-controlled 1+ sent-paid interLATA calls made from specially equipped U S West public pay telephones will be required to negotiate rate administration procedures with U S West in order for it to determine the rate amount. Transmittal 490 is currently scheduled to take effect on August 5, 1994.

2. U S West introduced its station-controlled pay telephone settlement process into its tariff in January 1993. The changes made by this transmittal give IXCs an additional option for 1+ sent-paid interLATA calls originating from U S West public pay telephones. At public pay telephones capable of processing the Telecard, the end user will have the options of: (1) using coins, (2) pay by credit card; or (3) paying for the call in advance by using a Telecard. The balance remaining on the Telecard is recorded on a physically integrated circuit embedded in the card. The amount of money remaining on the card is displayed on a screen on the pay telephone during the call.[1]

3. Under the terms of the tariff, the presubscribed IXC has[2] the option of "receiving both the 0+ and 1+ interLATA calls originated from Telephone Company's station-controlled public pay telephones or receive the 0+ interLATA traffic and select one secondary service provider, per LATA, to receive the 1+ interLATA sent-paid traffic."[3]

4. West Coast Telecommunications, Inc. (West Coast) filed a petition to reject or suspend and investigate Transmittal 490, and U S West filed a reply. West Coast asserts that Transmittal 490 should be rejected because it violates U S West's equal access obligations in the Modification of Final Judgment (MFJ).[4] According to West Coast, U S West is able to discriminate among IXCs because it can negotiate different "terms to different interexchange carriers, but it can also refuse to 'negotiate' at all with certain carriers."[5] West Coast further contends U S West can also discriminate among IXCs by choosing the location of the public pay telephone for its debit card service according to the identity of the IXC already presubscribed for that telephone.

5. West Coast also asserts that the Commission's decisions regarding local exchange carrier (LEC) joint use calling cards[6] are applicable to the U S West's debit card service. West Coast states that these decisions equally apply to prepaid card services which must be provided pursuant to tariffed terms and conditions. West Coast maintains that U S West's tariff does not comply with these decisions and the terms and conditions are not included in the tariff in violation of Section 203(c) of thep Communications Act, 47 U.S.C. § 203(c). Further, states West Coast there are restrictions on which IXCs are able to handle the debit card calls. Therefore, West Coast asserts that the tariff provisions in Transmittal 490 do not comport with of Sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a).

6. U S West contends that West Coast's real objection is to its station-controlled pay telephone tariff and not to the minor textual changes made by this transmittal. In response, U S West also asserts that cash cards are merely a substitute for cash and not credit cards. U S West maintains that West Coast's Petition is an untimely attack on its tariff provisions which have been in effect since January 1993. According to U S West, any challenge to existing tariff provisions should be via a Section 208 complaint. U S West also states that West Coast's reliance on the Commission's credit card decisions is misplaced. The cash card is nothing more than cash, states U S West, whereas the Commission's decisions on credit card use involve "extensive analysis of data base access, call validation toll fraud and market power." According to U S West the Telecard carries the amount of cash within the card itself. Finally, U S West states that the procedures already in effect do not violate the MFJ.[7]

7. The Tariff Division has reviewed the tariff filed by U S West, the tariff revisions, the petition to reject or suspend and investigate the tariff filed by West Coast Telecommuni-

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[1] U S West, Opposition To Petition to Reject or Suspend at 2-3.

[2] The premises owner selects the IXC to be presubscribed to that particular public pay telephone.

[3] U S West Tariff F.C.C. No. 1, Section 19.2(A), 1st Revised Page 19-4.2.

[4] United States v. AT&T, 552 F. Supp. 131, (D.D.C. 1882), *aff'd sub nom* Maryland v. U.S., 460 U.S. 1001 (1983).

[5] West Coast's Petition To Reject or Suspend at 4.

[6] *See e.g.*, Cincinnati Bell Telephone Company, Final Order, 6 FCC Rcd 3501 (1991); *see also* Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, *Report and Order and Request for Supplemental Comment*, 7 FCC Rcd 3528 (1992), *Second Report and Order*, 8 FCC Rcd 4478 (1993), *recon.*, 8 FCC Rcd 6393 (1993); *further recon.*, 8 FCC Rcd 8798 (1993).

[7] On August 2, 1994, U S West filed an application for special permission to file revisions to Transmittal No. 490. This application was granted on August 3, 1994, under Special Permission No. 94-913. These revisions clarify the tariff language originally filed under Transmittal No. 490.

cations, Inc., and U S West's reply. We conclude that no compelling argument has been presented that these tariffs are patently unlawful so as to warrant rejection or that an investigation is warranted at this time.

8. Accordingly, IT IS ORDERED that the petition to reject or to suspend and investigate U S West's Tariff F.C.C. No. 1, Transmittal No. 490 filed by West Coast Telecommunications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies AAD 94-59
Cost Allocation Manual Revisions
to Utilize a Statistical Sampling
Process for Technician Time
Reporting

MEMORANDUM OPINION AND ORDER

Adopted: August 5, 1994; Released: August 8, 1994

By the Chief, Accounting and Audits Division:

I. INTRODUCTION

1. On April 29, 1994, the Ameritech Operating Companies ("Ameritech")[1] filed revisions to their cost allocation manual ("CAM") to utilize a statistical sampling process for technician time reporting. Ameritech proposes that this process, which it refers to as Enhanced Time Distribution Process ("ETDP"), replace its current positive time reporting for assigning certain technician expenses to accounts and cost pools. In this Order, we grant conditional approval for Ameritech to implement its ETDP system subject to certain restrictions explained below.

II. BACKGROUND

2. Ameritech presently uses five different positive time reporting systems to record how its field technicians spend their time. These systems require each of Ameritech's field technicians to log their work hours on time sheets by assigning increments of time to field reporting codes. These codes represent specific jobs or functions. Ameritech uses them to account for its field technician costs and to apportion those costs between regulated and nonregulated activities.

3. In its CAM revisions, Ameritech proposes to replace these systems with ETDP for certain field technicians.[2] Ameritech states that ETDP is a statistical sampling process that relies on random sampling techniques to select field technicians who would be required to describe their work activities and log the time associated with each activity. According to Ameritech, a group of analysts would translate the information the technicians record into the necessary financial information by reviewing the technicians' activity logs and interviewing the sampled technicians. Ameritech indicates that it would use the results of this review to assign costs to the accounts and cost pools that it maintains pursuant to Parts 32 and 64 of the Commission's rules.[3] Ameritech contends that ETDP would simplify the time reporting process for the technicians, provide enhanced information to management and reduce the overall cost to the ratepayer through greater workforce efficiency. To quantify the impact ETDP would have on Ameritech's regulated operations,[4] Ameritech submits a chart that states that ETDP would increase Ameritech's regulated costs by $9.6 million.[5]

4. A Public Notice[6] was issued on May 17, 1994 inviting interested parties to file comments on Ameritech's CAM revisions by June 11, 1994, and reply comments by June 25, 1994. MCI Telecommunications Corporation ("MCI") filed comments in opposition. Ameritech and Southwestern Bell Telephone Company ("SWB") filed replies.

5. In its CAM revisions, Ameritech proposed to implement ETDP on July 1, 1994. Because of concerns regarding the potential effect of ETDP, the Accounting and Audits Division ("Division") stayed those revisions until December 22, 1994.[7] On July 8, 1994, the Division required Ameritech to provide clarification of the ETDP process as to precision and confidence levels, sampling techniques, technicians to be sampled, and prevention controls for data manipulation. The Division also required Ameritech to demonstrate how ETDP is more accurate than the current positive time reporting system, as Ameritech had asserted.[8] Ameritech responded to the Division's letter on July 12, 1994.[9]

III. PLEADINGS

6. MCI opposes Ameritech's CAM revisions for ETDP.[10] MCI questions both the validity of and the need to implement ETDP.[11] MCI contends that statistical sampling may lead Ameritech to manipulate the Part 64 allocation process.[12] In addition, MCI claims that Ameritech's CAM revisions do not make clear what sampling technique Ameritech proposes to employ, what work groups would be affected, and what the statistical sampling confidence

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[1] The Ameritech Operating Companies are Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.

[2] Ameritech proposes that technicians with the following job titles participate in ETDP: Communications Technician, Cable Repair Technician, Combination Technician, Field Service Technician, Field Attendant, Splicer, Repair Technician, Service Technician, and Systems Technician.

[3] 47 C.F.R. Parts 32, 64.

[4] Section 64.903(b) of our rules, 47 C.F.R. §64.903(b), requires quantification when these types of CAM revisions are proposed. quantification.

[5] Ameritech CAM Revision, Exhibit A (April 29, 1994).

[6] *See* 9 FCC Rcd 2261.

[7] *Ameritech Operating Companies' Cost Allocation Manual Revisions to Utilize a Statistical Sampling Process for Technician Time Reporting*, DA 94-721, at para. 5 (Accounting and Audits Div. June 28, 1994).

[8] Letter from Kenneth M. Ackerman, Chief, Accounting Systems Branch, Accounting and Audits Division, to Anthony M. Alessi, Director, Federal Relations, Ameritech (July 8, 1994).

[9] Letter from Anthony M. Alessi, Director, Federal Relations, Ameritech, to Kenneth M. Ackerman, Chief, Accounting Systems Branch, Accounting and Audits Division (July 12, 1994).

[10] *See* MCI Comments at 1.

[11] *Id.* at 1.

[12] *Id.* at 1.

levels would be under ETDP.[13] Finally, MCI states that Ameritech has submitted no cost/benefit analysis except to show that there would be a $9.6 million shift from nonregulated to regulated activities.[14]

7. In its reply, Ameritech states that any postponement in implementing ETDP would be unnecessary and costly.[15] According to Ameritech, MCI fails to provide sufficient evidence that the proposed ETDP system would not be a valid reporting system.[16] Ameritech states that the Commission has already approved statistical sampling processes similar to ETDP for Pacific Bell and for BellSouth.[17] Ameritech also states that in approving statistical sampling for Pacific Bell, the Common Carrier Bureau found that an ETDP system can attain results for a specified group of employees that are as accurate as those conventional positive time reporting provides.[18] Ameritech contends that in addition to reducing costs and increasing efficiency, ETDP appears to be a more accurate than conventional time reporting, due to ETDP's rigorous controls.[19]

8. Prior to filing its CAM revisions, Ameritech informed the Division that it was developing an ETDP process and, at the Division's direction, Ameritech retained an independent auditor to evaluate both the validity of the statistical techniques used in Ameritech's ETDP process and the effects of that process on Ameritech's accounting and cost allocation results. Ameritech maintains that it improved its proposed system considerably in response to the independent auditor's recommendations and that the auditor has attested to the statistical validity of the ETDP system.[20] Finally, Ameritech argues that MCI is incorrect in asserting that the CAM revisions did not provide sufficient information regarding ETDP. Ameritech claims Commission rules do not require CAMs to include cost/benefit analyses or employee job function codes, and states that the Commission has already rejected the argument that CAMs must include this type of detailed information.[21]

9. SWB supports Ameritech's CAM revision for ETDP.[22] SWB states that many commercial enterprises have realized substantial benefits by resorting to measurement techniques using statistical sampling.[23]

IV. DISCUSSION

10. For joint activities that are labor intensive, such as the field technician activities under consideration here, an accurate time reporting system is essential to prevent improper cross-subsidization. Ameritech proposes a statistical sampling process to replace its current positive time reporting process for certain field technicians. MCI questions the need for, and the validity of, Ameritech's proposal. As we stated in the *Pacific Statistical Sampling Order*, we believe that a statistical sampling process can be as accurate as positive time reporting while providing substantial savings.

11. Ameritech has been running both an ETDP system and its positive time reporting systems in parallel since September 1993. To help us evaluate Ameritech's ETDP process, we directed Ameritech to retain an independent auditor to evaluate both the validity of the statistical techniques used in Ameritech's ETDP process and the effects of that process on Ameritech's accounting and cost allocation results. Ameritech engaged Price Waterhouse to perform this audit. Price Waterhouse concluded that Ameritech's ETDP process was statistically sound, but recommended improved sampling, review, training, and internal control procedures. We also recommended additional refinements regarding matters such as the effect of natural disasters on the sampling process. In June 1994, we conducted an on-site review of Ameritech's ETDP process. This review confirmed that Ameritech has made the necessary refinements and that Ameritech's process can provide reliable results.

12. MCI fears that ETDP may lead to manipulation of the Part 64 allocation process. According to MCI, Ameritech's CAM revisions do not make clear which work groups would use ETDP, rather than positive time reporting. This fear stems from Ameritech's statement in its CAM revisions that employees subject to positive time reporting have two methods, ETDP and conventional positive time reporting, available to report time worked.[24] Based on our on-site review of Ameritech's ETDP system, sampled technicians do not have any choice in how their time is recorded. All time is recorded on the technician's activity log. Work relating to installation and maintenance expense is recorded by individual jobs and task segments and is included in the ETDP sample. Technicians will also record on their activity logs any construction or billable custom work performed. This time is, however, classified as an exclusion and not included in the ETDP study. We agree with MCI that Ameritech's CAM revisions do not make clear when its employees will utilize ETDP, rather than positive time reporting. Therefore, we require Ameritech to amend its CAM, within 30 days of the date of this Order, to state that its communications, cable repair, combination, field service, field attendant, splicer, repair service and systems technicians have their time recorded through ETDP except when they perform construction or billable construction work.

13. According to the proposed CAM revisions, Ameritech would randomly select employees to participate in its sampling process.[25] MCI asks what sampling techniques Ameritech would employ and what confidence level that sampling would be designed to achieve. In its response

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[13] *Id.* at 2.
[14] *Id.* at 3.
[15] Ameritech Reply at 4.
[16] *Id.* at 2.
[17] *Id.* at 2 *Pacific Bell's Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, 7 FCC Rcd 3917 (*"Pacific Statistical Sampling Order"*) (Com. Car. Bur. 1992) & *BellSouth Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, 9 FCC Rcd 602 (*"BellSouth Statistical Sampling Order"*) (Com. Car. Bur. 1994).
[18] *See Pacific Statistical Sampling Order*, 7 FCC Rcd at 3918.
[19] *Id.* at 2.
[20] *Id.* at 3.
[21] *Id.* at 4, *citing* Ameritech Operating Companies' Permanenet Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 6010 (Com. Car. Bur. 1988).
[22] SWB Reply at 1.
[23] *Id.* at 1.
[24] *See Id.* at VII-1.
[25] *See Id.* at VII-1-1c.

to the Division's July 8, 1994 letter, Ameritech states that its ETDP process would use statistical sampling to achieve plus or minus three percent precision with 95 percent confidence. Ameritech further explains that it would divide the employees subject to ETDP into groups defined by the type of work performed and geographic area of service. Random sampling would be used to select the employees included in the samples. We find these procedures sufficient.

14. In response to MCI's concern about the validity of ETDP, we believe that Ameritech's ETDP process should attain results that are as accurate as the positive time reporting systems currently in place. Under ETDP, technicians record time on their activity logs which describe typical activities by meaningful descriptions of tasks. Under positive time reporting, technicians had to record time by using several hundred codes which increased the error rate. Instead of using these codes, the technicians within the samples will describe their work and will be subject to higher level of scrutiny than under Ameritech's positive time reporting systems. We believe that these technicians will show greater diligence in filling out their activity logs. Supervisors who are responsible for reviewing the activity logs must sign off as to their reliability. The analysts then receive the activity logs and supporting documentation and perform a detail review including interviews with the technicians. Finally, this process is monitored by ETDP internal auditors for reliability and accuracy.

15. MCI argues that Ameritech provides no cost/benefit analysis to explain the $9.6 million shift from regulated to nonregulated Ameritech projects . We are also concerned about Ameritech's estimate of the increase in regulated costs resulting from the implementation of ETDP. Ameritech claims that the $9.6 million shift from nonregulated to regulated does not reflect any cost savings from implementing ETDP. Ameritech contends productivity increases from ETDP could range from $20 million to $33 million.[26] These potential savings persuade us to let Ameritech implement ETDP, subject to the conditions stated below.

16. It appears that most of the $9.6 million increase to regulated operations can be attributed to an increase in Account 6534, Plant operations administration expense. Ameritech claims that the regulated portion of Account 6534 would increase by $12.8 million. Ameritech explains that this increase would result because under the current positive time reporting system technicians were not reporting their nonproductive time (e.g., non-job specific training) to this account, as Commission rules require.[27] Ameritech claims that instead of reporting all nonproductive time to Account 6534, some technicians were including their nonproductive time as part of their first job of the day or as part of travel time. While this explains why ETDP would increase the balance in Account 6534, it fails to explain why 90 percent of the increase would be assigned to regulated operations. Therefore, pending further study of this issue by Commission staff, the approval of Ameritech's ETDP is conditioned on Ameritech's capping the regulated amounts in Account 6534 at the levels recorded for 1993. Pending further Commission action, Ameritech must assign any increases in Account 6534 above the 1993 regulated amounts to nonregulated operations. After the staff completes its study, we will determine what adjustments, if any, Ameritech will be required to make for this account and, if necessary, to any other Part 32 accounts that may have been affected. We also may revoke our approval of ETDP.

17. Our approval of Ameritech's CAM revision is limited to the use of the statistical sampling method described in Ameritech's submissions and in this Order for those technicians listed in footnote 2. Ameritech must not make any changes to its ETDP system without prior notification and approval of the Commission. Further, the review of ETDP is to be made part of the overall CAM review conducted annually by the independent auditors under Part 64.904 of the Commission's rules.[28] This audit must include, but is not limited to, the following steps. The independent auditors must evaluate the internal controls for ETDP, validate the statistical sampling, and verify the required number of interviews.

V. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 220, and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the cost manual revisions pertaining to Section VII, Time Reporting Procedures, filed April 29, 1994, by Ameritech IS APPROVED, subject to the conditions stated above.

19. IT IS FURTHER ORDERED that this Order IS EFFECTIVE UPON ADOPTION.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

[26] These increases will result primarily from having fewer technicians report their time and from simplifying the tasks of data entry clerks.
[27] 47 C.F.R. §32.6534.
[28] 47 C.F.R. §64.904.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NYNEX Telephone Companies — Transmittal No. 292

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: August 2, 1994; Released: August 3, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On April 22, 1994, NYNEX Telephone Companies (NYNEX) filed Transmittal No. 292 to introduce regulations governing 1+ sent-paid calls made from specially equipped NYNEX public telephones for interexchange carrier customers who are presubscribed to those telephones and enter into a billing and collection agreement to receive calls made using the NYNEX Change Card. Transmittal 292 is scheduled to take effect on August 4, 1994. West Coast Telecommunications, Inc. (West Coast) filed a petition to reject or suspend and investigate Transmittal 292, and NYNEX filed a reply.

2. NYNEX states that its debit card, called a Change Card, can be used instead of coins to place calls from specially equipped public telephones. The debit card will allow end users to place 1+ sent-paid calls, including local, intraLATA toll, interLATA, and international calls, without depositing coins. Customers may purchase the debit cards and, upon surrender of the card, obtain refunds on any unused portion of the card from a variety of sources.[1]

3. The customer has the option of using the NYNEX Change Card for 1+ dialing to reach the interexchange carrier (IXC) who is presubscribed to the telephone or an IXC other than the presubscribed carrier, provided that the other IXC has entered into a billing and collection agreement with NYNEX. A presubscribed IXC who chooses not to accept 1+ traffic is not precluded from handling 0+ traffic. In addition, NYNEX states that while the debit card can only be used for 1+ and 10XXX 1+ calls, 0+ calls can be made from the specially equipped public telephones without the use of the debit card. If the IXC chosen by the customer has not entered into a contractual agreement with NYNEX for billing and collection, the call will be routed to a recorded announcement which will state that the call cannot be completed.[2]

4. West Coast asserts that Transmittal 292 should be rejected because it violates NYNEX's equal access obligations as set out in the Modification of Final Judgment.[3] According to West Coast, NYNEX is able to discriminate among IXCs because the only IXCs who will be able to subscribe to the debit card service are those IXCs who have entered into a billing and collection agreement with NYNEX. West Coast further contends NYNEX can also discriminate among IXCs by choosing the location of the telephone for its debit card service according to the identity of the IXC presubscribed for that location. According to West Coast, NYNEX, in effect, is essentially choosing the IXC for that telephone by selecting a particular premise for its service.

5. In addition, West Coast alleges that NYNEX's debit card arrangement is an illegal tying arrangement because an IXC must enter into a billing and collection arrangement with NYNEX in order to subscribe to NYNEX's access services for the offering of the debit card. West Coast also asserts that the Commission's decisions regarding local exchange carrier (LEC) joint use calling cards[4] are applicable to the NYNEX's debit card service. West Coast states that these decisions require that calling cards services must be offered by all LECs on a just, reasonable and non-discriminatory basis, pursuant to tariffed terms and conditions. West Coast maintains that NYNEX's tariff does not comply with these decisions because the terms and conditions of the billing and collection agreements are not included in the tariff and because there are restrictions on which IXCs are able to handle the debit card calls. Therefore, West Coast asserts that the tariff provisions in Transmittal 292 constitute an unjust and unreasonable practice in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), an unjust and unreasonable discrimination in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), and finally, a failure to file a tariff for communications services in violation of Section 203(c) of the Communications Act, 47 U.S.C. § 203(c).

6. In response, NYNEX asserts that debit cards are merely a substitute for coins and therefore are very different from LEC calling cards. According to NYNEX, the difference is that the LEC calling card call is billed and collected after the call is completed, whereas the customer using the debit card pays for the call while the call is in progress, exactly like a coin call. NYNEX maintains that it is not required to file tariffs for the rating, billing, collection and remittance of the revenues associated with Change Card calls because these functions are clearly within the purview of billing and collection services which the Commission has detariffed.[5] Moreover, NYNEX claims there is no illegal tying arrangement because telecommunications

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[1] NYNEX Transmittal No 292, Description and Justification (D&J) at 2.

[2] D&J at 2; Letter from NYNEX to Assistant Chief, Tariff Division, June 29, 1994.

[3] *United States v. AT&T*, 552 F. Supp. 131, (D.D.C. 1882), *aff'd sub nom Maryland v. U.S.*, 460 U.S. 1001 (1983).

[4] *See e.g., Cincinnati Bell Telephone Company*, 4 FCC Rcd 5033 (Common Carrier Bureau 1989), *Designation Order*, 4 FCC Rcd 5735 (Common Carrier Bureau 1989), *Memorandum Opinion and Order*, 5 FCC Rcd 805 (1990); *Final Order*, 6 FCC Rcd 3501 (1991); *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Report and Order and Request for Supplemental Comment*, 7 FCC Rcd 3528 (1992), *Second Report and Order*, 8 FCC Rcd 4478 (1993), *recon.*, 8 FCC Rcd 6393 (1993); *further recon.*, 8 FCC Rcd 8798 (1993).

[5] *In the Matter of Detariffing of Billing and Collection Services*, Report and Order, 102 FCC 2d 1150 (1986), *Memorandum Opinion and Order*, 1 FCC Rcd 445 (1986) (Reconsideration Order).

services are not covered by the antitrust laws, and regardless, there is only one "product" being offered by NYNEX - its Change Card service offering. In addition, NYNEX denies that it requires that IXCs enter into a billing and collection agreement as a condition of their purchasing access service. According to NYNEX, the tariff revisions merely set out the terms and conditions under which NYNEX will deliver traffic to carriers that already purchase this service; carriers are not required to take the Change Card traffic if they do not want it. Finally, NYNEX states that the Commission is the wrong forum in which to bring MFJ disputes.[6]

7. We have reviewed the tariff filed by NYNEX, the petition to reject or suspend and investigate the tariff filed by West Coast Telecommunications, Inc., and NYNEX's reply. Based on these filings, we conclude that no compelling argument has been presented that these tariffs are patently unlawful so as to warrant rejection or that an investigation is warranted at this time.

8. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate NYNEX Tariff F.C.C. No. 1, Transmittal No. 292 filed by West Coast Telecommunications, Inc. IS DENIED.

9. IT IS FURTHER ORDERED that Application No. 147, filed on July 13, 1994, by NYNEX, IS GRANTED. This will enable NYNEX to file the tariff material requested there to become effective on not less than one day's notice.

10. IT IS FURTHER ORDERED that, for this purpose Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. § § 61.58, 61.59 are waived. NYNEX should cite the "DA" number of the instant Order as the authority for this filing.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[6] On July 13, 1994, NYNEX filed an application for special permission to file revisions to Transmittal No. 292. West Coast filed a letter stating its objection to NYNEX's application. West Coast contends that NYNEX fails to show good cause for granting the special permission request, as required by Section 61.152(c) of the Commission's Rules and that the proposed revisions are vague and ambiguous in violation of Section 61.54(j) of the Commission's Rules. We find that NYNEX has shown good cause to grant the special permission request so that the revisions, which are intended to modify material in Transmittal No. 292, become effective at the same time as Transmittal No. 292 does. We conclude that no compelling argument has been presented that the tariff revisions contained in the application for special permission are patently unlawful so as to warrant rejection of the proposed changes.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TIME WARNER CABLE CSR-4245-P

Petition for Public Interest Determination
under 47 C.F.R. § 76.1002(c)(4)
Relating to Exclusive Distribution of
Prime Ticket Network

ORDER

Adopted: August 1, 1994; Released: August 2, 1994

By the Chief, Cable Services Bureau:

1. On March 14, 1994, Time Warner Cable ("Time Warner") filed a Petition for Exclusivity requesting a public interest determination by the Commission pursuant to Sections 76.1002(c)(4) and (5) of the Commission's rules authorizing Time Warner to enforce an exclusive distribution agreement with Prime Ticket Network ("Prime Ticket"), a cable programming network.[1] The Petition was placed on public notice April 7, 1994. Oppositions to the petition were filed by Vanguard Cable ("Vanguard"), a satellite master antenna television operator and a competitor to Time Warner in Southern California, on May 6, 1994, and by the California State Attorney General on May 9, 1994. On May 23, 1994, Time Warner filed its response to the California State Attorney General's Opposition.[2]

2. On June 17, 1994, Time Warner filed a Motion for Withdrawal of its Petition for Exclusivity. In its Motion, Time Warner submits that it will not seek to enforce the exclusivity provisions in the Time Warner-Prime Ticket affiliation agreement. We note that Vanguard filed an Opposition to Time Warner's Motion for Withdrawal on June 24, 1994. Vanguard requests that the Commission grant Time Warner's Motion conditioned upon the filing of a true copy of an Amendment to the affiliation agreement modifying the agreement by eliminating any exclusive rights in its terms.

3. Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), exclusive contracts between a cable operator and a vertically integrated programming vendor, in areas served by a cable operator, are prohibited unless the Commission determines that such exclusivity is in the public interest.[3] Without a determination from the Commission that the exclusive distribution agreement between Time Warner and Prime Ticket is in the public interest, those exclusive distribution provisions in the contract are prohibited under the 1992 Cable Act and the Commission's rules. Thus, Prime Ticket may not deny access of its programming service to any multichannel video programming distributor ("MVPD") on the basis of an exclusive distribution agreement with Time Warner.

4. We reject Vanguard's requested condition for Withdrawal because we believe it is unnecessary. Any MVPD who believes that Time Warner or Prime Ticket is enforcing the exclusive distribution agreement in violation of Section 628(c)(2)(D) of the Communications Act may file a program access complaint with the Commission against both Time Warner and Prime Ticket or either entity.[4] The Commission's rules require that the aggrieved MVPD must notify the potential defendant programming vendor or cable operator of its intention to file a program access complaint and of the nature of the potential complaint, in order to allow the parties to resolve the dispute.[5] If the parties cannot resolve the dispute after such notification, the aggrieved MVPD may file a complaint with the Commission.[6]

5. Vanguard submits no information showing that the obligations imposed by the Commission's Program Access rules are not sufficient to ensure access by MVPDs to Prime Ticket's programming service. Time Warner has expressly represented to Vanguard and the Commission that it will not enforce the exclusivity provision in its agreement with Prime Ticket. Therefore, we believe that it is unnecessary to condition the Withdrawal of Time Warner's Petition for Exclusivity upon the imposition of any additional requirements.

6. Accordingly, IT IS ORDERED, that the Petition for Exclusivity of Time Warner Cable IS DISMISSED. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules.

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[1] Time Warner on November 12, 1993, filed one Petition for Exclusivity for separate exclusive distribution agreements with two programming vendors: Court TV and Prime Ticket Network. On March 14, 1994, Time Warner withdrew its initial Petition and refiled two separate Petitions for Exclusivity for Court TV and Prime Ticket. On June 1, 1994, the Commission denied Time Warner's Petition for Exclusivity for Court TV, *see Time Warner Cable, Memorandum Opinion and Order*, CSR-4231-P, FCC 94-132 (released June 1, 1994).

[2] Time Warner did not receive Vanguard's Opposition until May 31, 1994, and requested an extension of time to file a Response to the Opposition. The Competition Division staff held a telephone conference with Time Warner and Vanguard on June 7, 1994, to resolve Time Warner's request. The Competition Division staff, upon agreement of the parties, allowed Vanguard to file a Supplement to its Opposition by June 10, 1994, and allowed Time Warner until June 20, 1994, to file a Response to Vanguard's Opposition and Supplement. Time Warner did not file a Response.

[3] Pub. L. No. 102-385, 106 Stat. 1460 §§ 19(c)(2)(C)(1992). Section 628(c)(2)(C) of the Communications Act of 1934, *as amended* (hereinafter, the "Communications Act"), 47 U.S.C. § 548(c)(2)(C).

[4] The pleading and procedural requirements for filing a Program Access Complaint are set forth in the Commission's rules at 47 C.F.R. § 76.1003.

[5] *See* 47 C.F.R. § 76.1003(a).

[6] *See* 47 C.F.R. §§ 76.1003(a)-(c),(k) and (l). The aggrieved MVPD must at a minimum wait ten days after notification before filing a complaint with the Commission.47 C.F.R. § 76.1003(a).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 8, 1994

U S WEST COMMUNICATIONS, INC.
AMENDMENT AND REQUEST FOR MODIFICATION

of its Section 214 Authorization to construct, operate, own and maintain facilities and equipment to provide video dialtone service in portions of the Omaha, Nebraska service area (FCC File No. W-P-C 6868)

U S WEST Communications, Inc. has filed an Amendment and Request for Modification of its Section 214 authorization granted by the Commission on November 24, 1993. Amendment and Request for Modification (August 5, 1994); *see* U S WEST Communications, Inc., 9 FCC Rcd. 184 (1993).

Interested parties may file comments within 14 days of the release of this Public Notice. All filings should refer to the file number, W-P-C-6868, and be sent to William F. Caton, Acting Secretary, Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554. Copies of U S WEST's Amendment and Request for Modification may be obtained from International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. The filing will also be available for review and photocopying in the offices of the Common Carrier Bureau's Policy and Program Planning Division, Room 544, 1919 M Street, N.W., Washington, D.C., from 9:00 a.m.-12:00 p.m. and 1:30 p.m.-4:30 p.m., Monday through Friday. For further information, contact Peggy Reitzel at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-89

In the Matter of

Elehue Kawika Freemon and
Lucille K. Freemon,
Complainants,

v. File No. E-90-393

American Telephone and Telegraph Company,
Defendant.

HEARING DESIGNATION ORDER

Adopted: July 20, 1994; Released: August 12, 1994

By the Commission:

I. INTRODUCTION

1. In this Order we designate the above-captioned complaint proceeding for hearing to resolve material questions of fact surrounding the American Telephone and Telegraph Company's (AT&T's) handling of an operator-assisted telephone call involving the complainants in this case, Elehue Kawika Freemon (Elehue Freemon) and Lucille K. Freemon (Lucille Freemon) (together the Freemons or complainants). The Freemons allege that on May 30, 1988, an AT&T operator intercepted and disclosed the contents or meaning of their telephone conversation in violation of Section 705 of the Communications Act, 47 U.S.C. § 605, and other laws not within this Commission's jurisdiction.[1] The issue to be decided in this Section 208 complaint proceeding[2] is whether AT&T's actions violated Section 705 of the Act, and if so, whether the Freemons suffered any measurable harm as a consequence of such violations and are entitled to an award of damages.[3] As discussed below, we are unable to resolve substantial questions of fact raised by the parties, the resolution of which is essential to a determination in this proceeding. An evidentiary hearing will permit both the Freemons and AT&T to establish the record necessary for a decision to be made.

II. BACKGROUND AND CONTENTIONS OF THE PARTIES

2. The record shows that on May 30, 1988, at or about 10:30 p.m., Elehue Freemon placed a long distance, operator-assisted, collect call from Gresham, Oregon, to Lucille Freemon, his mother, in Long Beach, California. Although the parties agree that the call was carried by AT&T, the length of the call and whether, in fact, the parties were ever connected to each other is in dispute. At some point, the AT&T operator concluded that Mr. Freemon might be experiencing a medical emergency and asked Lucille Freemon if her son might need emergency medical assistance. The parties differ on some of the details of the operator's intervention, but both sides agree that the operator subsequently contacted local emergency services in Gresham, which, based on the information provided by the AT&T operator, dispatched the local police to Elehue Freemon's residence. The responding officers indicated that when they arrived, Mr. Freemon appeared unsteady and under the influence of a drug. The officers reported that Mr. Freemon admitted taking sleeping pills, but was unable to recall how many. After finding what they believed to be a suicide note, the officers concluded that Freemon had attempted to take his life by ingesting sleeping pills and wine. Following an examination by the Gresham emergency medical technicians, Freemon was transported to Portland Adventist Hospital, where he was hospitalized and "placed on a Police Officer Mental Hold" for his own safety.[4] Freemon was released four days later.

3. The complainants filed their formal complaint August 16, 1990,[5] alleging, *inter alia*, that AT&T had violated Section 705 of the Act by monitoring the complainants' telephone conversation and disclosing its contents or meaning. On September 20, 1990, AT&T filed an answer in which it disputes the legal and factual bases of the Freemons' claims. Both parties have since filed numerous pleadings and related motions in which the facts and circumstances surrounding the complainants' claims are sharply disputed. In addition, the parties have exchanged interrogatories directed at clarifying the bases of their respective claims.[6]

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[1] In addition to alleging violations of Section 705 of the Act, the Freemons claim that AT&T's actions violated 18 U.S.C. §§ 2510, 2511, and 2518, and the fourth, fifth, ninth, and nineteenth amendments to the United States Constitution. We dismiss these claims for lack of subject matter jurisdiction.

[2] *See* 47 U.S.C. § 208.

[3] The Commission recently affirmed its discretion (and its staff's pursuant to delegated authority) to conduct bifurcated complaint proceedings, "either by bifurcating discovery itself, or by bifurcating [its] action into liability and damages phases." *Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, 8 FCC Rcd 2614, 2620 (1993). Whether bifurcation is appropriate in this proceeding is a matter properly left to the discretion of the Presiding Judge.

[4] *See* Answer, Exhibit B.

[5] E. Freemon initially filed an informal complaint on February 9, 1989, regarding AT&T's handling of his call. *See* File No. IC-89-03060. After its investigation, the Informal Complaints Branch determined that no further action was necessary and terminated the proceeding. Letter from Maeola V. Black to Elehue K. Freemon (Jan. 4, 1991).

[6] The parties exchanged interrogatories and answered them with certain objections. Neither party filed further pleadings concerning these interrogatories. The complainants filed a motion for "Discovery Through Use of Public Opinion," through which complainant apparently seeks public comment on the complaint. AT&T opposed the motion, stating that such comment would be inappropriate given the relatively narrow issues in the complaint.

The complainants also filed two motions to accept late-filed pleadings. The first included a one-page record of the contact between AT&T's operator and the State of Oregon Emergency System. AT&T generally supported this motion to the extent

4. The crux of the Freemons' complaint is the allegation that the AT&T operator who handled Elehue Freemon's May 30, 1988 call improperly interrupted and divulged the contents of his call and thus violated Section 705(a) of the Act.[7] According to Mr. Freemon, AT&T's operator listened to their eight-minute conversation and then interrupted to ask Lucille Freemon if her son needed medical help. Mr. Freemon claims that he had already refused two offers of assistance by the operator and that the operator's subsequent actions were inappropriate.[8]

5. AT&T admits that its operator forwarded complainants' call to the Gresham emergency services agency and advised them that an emergency may have existed with the caller, but claims that she did so when the call was initially placed and that no conversation ensued between the Freemons. AT&T maintains, however, that its operator's actions were a proper and necessary incident to rendering AT&T's service, and thus, were authorized under an exception to Section 705(a), set forth in 18 U.S.C. § 2511(2)(a)(i).[9] According to AT&T's operator, Elehue Freemon provided his mother's seven-digit telephone number, but was unable to remember her area code. The operator also stated that he sounded incoherent, and appeared to be having trouble breathing. Based on these facts, AT&T argues that its operator properly concluded that a medical emergency might exist and responded accordingly.[10]

6. In reply, the complainants dispute AT&T's claim that an emergency situation existed that warranted the operator's intervention. Elehue Freemon claims that the AT&T operator misinterpreted the meaning of what she overheard: that he had programmed his mother's area code into his telephone and could not be expected to remember it; that the difficulty in breathing detected by the operator was a result of his exercising on a trampoline; and that his statements to his mother about "ending it all" that the operator may have overheard were in reference to his business. In addition, he asserts that when asked, he told the operator he did not need medical assistance.[11]

7. Finally, AT&T argues that because Section 705(c)(3)(A) of the Act provides for trial of civil actions based on Section 705 in a federal district court or other court of competent jurisdiction, the Commission's Section 208 jurisdiction is superseded.[12]

III. DISCUSSION

8. We reject at the outset AT&T's threshold claim that the Commission lacks jurisdiction over the subject matter of the complaint. We find no support in the language of Section 705 or in caselaw decided under that section to support AT&T's position. Section 705(e)(3)(A) states: "Any person aggrieved by any violation of subsection (a) or paragraph 4 of subsection [(e)] may bring a civil action in a United States district court or in any other court of competent jurisdiction." Use of the word "may" shows that Congress clearly intended the statute to provide an aggrieved party the choice of using either this agency or the federal court system to resolve a complaint. The statute simply cannot be read to vest exclusive jurisdiction over a Section 705 complaint in the federal district court. Moreover, Sections 207 and 208 of the Act, 47 U.S.C. §§ 207, 208, states that a complaint may be filed with the Commission alleging any violation of the Act by a common carrier and damages may be claimed in that complaint. Finally, Section 705 also states that the "penalties under this subsection shall be in addition to those prescribed under any other provision of [the Act]."[13] Thus, AT&T's request is denied.

9. The principal factual dispute in this matter centers around AT&T's defense that its operator discussed with Lucille Freemon what she perceived as Elehue Freemon's emergency situation, and, with Lucille Freemon's acquiescence, then referred Mr. Freemon's call to the Gresham emergency services without ever connecting the Freemons to each other. AT&T claims that no conversation between the Freemons took place and its operator transferred Elehue Freemon's call to emergency services pursuant to procedures established by AT&T for such calls. The complainants, on the other hand, assert that they spoke for approximately eight minutes before the operator interrupted the call to speak with Lucille Freemon, and that only after this period did the operator transfer the call to emergency services.

10. We have carefully reviewed the evidence and arguments presented by the parties and conclude that further proceedings are necessary to resolve material questions of fact bearing on whether AT&T violated Section 705 of the Communications Act, as alleged in the complaint. AT&T states that Section 2511(2)(a)(i) of Title 18 permits an operator of a switchboard to intercept and disclose the contents of a telephone call in the normal course of her

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that it sought to admit evidence. The second pleading included for the record a letter from the Bureau of Emergency Communications for Portland, Oregon, providing clarification of incident #1254 (complainants' phone call). AT&T did not oppose this motion. In the interest of a complete record in this proceeding, we grant the complainants' motions.

[7] Section 705(a) states, in pertinent part:

> Except as authorized by chapter 119, title 18, United States Code, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof. . . .

47 U.S.C. § 605(a).

[8] Complaint at 2, 9; Reply at 1.

[9] Section 2511(2)(a)(i) states, in relevant part:

> It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communications service, whose facilities are used in the transmission of a wire communication, to intercept, disclose or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service. . . .

18 U.S.C. § 2511(2)(a)(i).

[10] Answer at 7-9.

[11] Reply at 1-2, 7.

[12] Answer at 10.

[13] 47 U.S.C. § 705(e)(5).

employment if she has reason to believe that an emergency situation exists. What is not clear from the record, however, is whether the operator's actions were taken in the ordinary course of handling Elehue Freemon's call or whether she connected the call and then monitored it to determine that an emergency situation existed. Particularly in the latter event, such actions could raise a question of lawfulness under Section 705. Moreover, even if it could be said that the record before us provides a sufficient basis to determine that AT&T's actions were unlawful as alleged, we still would be left with a substantial question of whether and to what extent Freemon suffered actual harm and is entitled to an award of damages from AT&T as a consequence of AT&T's actions. In order to avoid further delay in resolving the factual questions posed by the parties, and to ensure that the parties have a full and fair opportunity to present their claims, we will designate this complaint proceeding for hearing before an Administrative Law Judge (ALJ) on the issues of liability and damages set forth below.[14] To the extent it becomes necessary for the ALJ to rule on AT&T's interpretation of Section 2511(2)(a)(i) of Title 18, he should forward to the General Counsel a request that the General Counsel solicit the views of the Department of Justice.[15]

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 206, 207, 208, and 209, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 206, 207, 208, 209, that the above-captioned complaint proceeding IS DESIGNATED FOR HEARING in a proceeding to be held before an Administrative Law Judge at a time and place to be specified in a subsequent order upon the following issues:

1. To determine the facts and circumstances surrounding AT&T's handling of Elehue Freemon's operator-assisted "telephone call to his mother, Lucille Freemon, on May 30, 1988.

2. To determine whether a telephone conversation ensued between Elehue Freemon and Lucille Freemon on May 30, 1988, at the time an AT&T operator handled the operator-assisted call at issue.

3. To determine whether AT&T, through its operator or otherwise, intercepted and disclosed the contents or meaning of any telephone conversation that may have taken place between Elehue Freemon and Lucille Freemon on May 30, 1988, within the meaning of Section 705 of the Communications Act.

4. To determine, in light of the evidence adduced under issues 1 through 3 above, whether AT&T's actions in handling Elehue Freemon's May 30, 1988 operator-assisted call violated Section 705 of the Communications Act.

5. To determine, in view of the evidence adduced on the foregoing issues, whether and if so, in what amounts, AT&T should be required to pay monetary damages to complainants.

6. To determine, in view of the evidence adduced on the foregoing issues, whether complainants are entitled to an award of prejudgment interest on any damages recovered in this proceeding.[16]

12. IT IS FURTHER ORDERED, that the burden of proof and the burden of proceeding with the introduction of evidence shall be upon complainants.

13. IT IS FURTHER ORDERED, that the designated parties may avail themselves of an opportunity to be heard by filing with the Commission a Notice of Appearance in accordance with Section 1.221 of the Rules, 47 C.F.R. § 1.221, within twenty (20) days of the mailing of this Order.

14. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED in so far as it makes claims and seeks relief pursuant to 18 U.S.C. §§ 2510, 2511, and 2518, and the Fourth, Fifth, Ninth, and nineteenth amendments to the United States Constitution.

15. IT IS FURTHER ORDERED that the Freemons' request for "Discovery Through Use of Public Opinion," filed May 16, 1991, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[14] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

[15] Any such request to the General Counsel should be served on the parties.

[16] The Commission recently affirmed its authority to award interest in common carrier complaint cases. *See MCI Telecommunications Corp. v. Pac. Northwest Tel. Co., et al.*, 8 FCC Rcd 1224 (1993), *appeal pending sub nom. MCI Telecommunications Corp. v. F.C.C.*, No. 93-1166 (D.C. Cir. filed Feb. 18, 1993). In deciding whether to award interest in a particular common carrier complaint case, the Commission is "generally guided by federal court practice, where the award of prejudgment interest is a matter left to the sound discretion of the trial court." *Id.* at 1229, citing *United States v. Cal. Bd. of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *rehearing denied*, 456 U.S. 985 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Complaint of

LIBERTY CABLE COMPANY, INC. CSR-4242-P

v.

COURTROOM TELEVISION NETWORK

ORDER

Adopted: August 1, 1994; Released: August 2, 1994

By the Chief, Cable Services Bureau:

1. The Commission has before it a Program Access Complaint (CSR-4242-P) filed by Liberty Cable Company ("Liberty") against Courtroom Television Network ("Court TV") on December 9, 1993. Liberty alleges that Court TV violated Section 628(c)(2)(D) of the Communications Act of 1934, as amended, because Court TV, on the basis of an exclusive agreement with Time Warner Cable ("Time Warner"), refused to provide its programming service to Liberty for distribution on Liberty's satellite master antennae television ("SMATV") system in New York.[1]

2. Prior to the filing of Liberty's Complaint, the Commission had received a Petition for Exclusivity filed by Time Warner on November 12, 1993, that dealt with separate exclusive contracts with Court TV and Prime Ticket Network.[2] With respect to Court TV, Time Warner requested a public interest determination pursuant to Sections 76.1002(c)(4) and (5) of the Commission's rules authorizing Time Warner to enforce an exclusive distribution agreement with Court TV for all areas in which Time Warner operated a cable system, including New York City.

3. On December 23, 1993, before filing an Answer to Liberty's Complaint, Court TV filed a motion to hold the complaint in abeyance pending resolution of Time Warner's Petition. Liberty filed an Opposition to Court TV's Motion on January 5, 1994. The Cable Services Bureau determined that "resolution of Liberty's complaint necessarily involves a determination regarding whether Time Warner's exclusivity with Court TV is in the public interest and thus permissible under the 1992 Cable Act."[3] On the basis of this finding the Bureau concluded that because the petition and the complaint involved an analysis of the same issues, to conserve administrative resources it would first consider Time Warner's Petition. On March 25, 1994, the Bureau held the complaint in abeyance.[4]

4. On March 14, 1994, Time Warner withdrew its initial Exclusivity Petition and refiled two separate Exclusivity Petitions covering Court TV and Prime Ticket Network. The Petition for Exclusivity for Court TV (CSR-4231-P) was placed on public notice on March 16, 1994. Oppositions to the Petition were filed on April 15, 1994, by Liberty and the New York State Attorney General. On April 25, 1994, Time Warner filed a Response to the Oppositions. On June 1, 1994, the Commission denied Time Warner's Petition. Thus, enforcement of the exclusive distribution agreement is impermissible under the 1992 Cable Act.[5]

5. Accordingly, pursuant to the Commission's Order denying Time Warner's Petition, Court TV may not, on the basis of its exclusive distribution agreement with Time Warner, refuse to distribute its service to any multichannel video programming distributor, including Liberty.[6] The Commission's denial of Time Warner's Petition alters the factual basis of Liberty's Complaint. Indeed, Court TV in its motion to hold the complaint in abeyance informed the Commission that upon denial of Time Warner's Petition, "Court TV would, subject to mutually agreeable terms, distribute the Court TV service to Liberty."[7] The facts as originally pled in Liberty's Complaint have changed, and the Bureau believes that administrative resources would not be served in addressing Liberty's Complaint because the Complaint is moot as currently pled. We dismiss Liberty's Complaint without prejudice to its rights to file a program access complaint relating to access to Court TV programming services if subsequent negotiations give rise to such a complaint.

6. Accordingly, IT IS ORDERED, that the Complaint of Liberty Cable Company, Inc. IS DISMISSED. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[1] *See* Cable Television Consumer Protection and Competition Act of 1992 (hereinafter, the "1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. 1460 §§ 19(c)(2)(D)(1992), 47 U.S.C. §§ 548(c)(2)(D).

[2] We note that the initial petition was not placed on public notice because Time Warner sought confidentiality with respect to certain information contained in the Petition. The Commission declined to grant the request for confidentiality, and in accordance with 47 C.F.R. § 0.459(e) the petition was returned to Time Warner.

[3] *Complaint of Liberty Cable Company v. Courtroom Television Network, Order*, CSR 4242-P, DA 94-397 (released May 23, 1994) at para. 5.

[4] *See Id.*

[5] *See Time Warner Cable, Memorandum Opinion and Order*, CSR-4231-P, FCC 94-132, (released June 1, 1994).

[6] *See Id.*, at para. 2.

[7] Motion to Hold Complaint in Abeyance, filed by Courtroom Television December 23, 1993, in CSR-4242-P, at 3; Renewed Motion to Hold Complaint in Abeyance, filed by Courtroom Television March 16, 1994, in CSR-4242-P, at 3.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 9, 1994

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON ROCHESTER'S PETITION FOR WAIVERS OF PART 69 OF THE COMMISSION'S RULES RELATED TO ACCESS CHARGES

In May 1993, Rochester Telephone Corporation filed a petition for waiver of Part 69 Rules to implement an "Open Market Plan." (*See* DA 93-687, May 19, 1993). On July 29, 1994, Rochester withdrew its earlier petition and filed a revised petition asking the Commission to waive certain provisions of Part 69 of the Commission's Rules related to access charges. Rochester states that this new petition is required because of changes in Rochester's Open Market Plan that have occurred since Rochester filed its 1993 Petition. Rochester asserts that grant of the requested waivers satisfies the "good cause" standard set forth in §1.3 of the Commission's Rules and will serve the public interest.

Rochester states that under its Open Market Plan, as revised, it intends to divide its local exchange operations in the Rochester, New York, area into two parts. Rochester states that basic network services would be provided by a new fully-regulated subsidiary of Rochester, "R-Net", which will offer its services on an unbundled, non-discriminary "wholesale" basis. Rochester further states that a second newly-created subsidiary, "R-Com", will offer local and intraLATA services at the "retail" level in competition with other local providers. Under Rochester's original plan, R-Net was to operate almost exclusively as a wholesale provider, having few or no direct relationship with end users. Under the Modified Plan, R-Net will continue to have relationships with end users, but other local providers will have an opportunity to attract customers away from R-Net.

Rochester requests waiver of the Part 69 Rules to permit R-Net to (a) assess End User Common Line (EUCL) and Presubscription Change charges upon the local service providers rather than directly upon end users; and (b) assess a per-month CCL charge upon local service providers that utilize R-Net common lines, but for which R-Net is not providing the Class 5 switching function, and therefore, cannot measure usage originating or terminating over such common lines.

Interested parties may file comments on this petition for waivers **September 12, 1994**, and reply comments by **September 27, 1994**, with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition for waivers can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT CORPORATION File No. I-T-C-94-272

Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Provide Satellite Services for the Provision of Public Switched and Private Line Services Between the United States and Cuba

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: July 29, 1994; Released: August 12, 1994

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned uncontested application, filed by COMSAT Corporation, through its COMSAT World Systems business unit ("COMSAT"), seeking authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide satellite services for the provision of public switched and private line services between the United States and Cuba. Specifically, COMSAT requests blanket authority to provide the space segment services required by those U.S. carriers authorized by the Commission to provide public switched voice and data, and private line services between the United States and Cuba via INTELSAT satellites located at 325.5^0, 329^0, 332.5^0 and 335.5^0 East Longitude.

2. In a letter dated July 22, 1993, the U.S. Department of State informed the Commission of the Executive Branch's general policy guidelines ("Policy Guidelines") for implementation of the telecommunications provisions of the Cuban Democracy Act, 22 U.S.C. §6004(e) (1993), which provides that "telecommunication services between the United States and Cuba shall be permitted."[1] Among the policy guidelines are the following requirements: 1) the proposals must have the potential to be operational within a year; 2) settlements must not be more favorable to Cuba than the current 50/50 split of the $1.20 per minute accounting rate; 3) proposals must be limited to equipment and services necessary to deliver a signal to Cuba; 4) proposals must utilize modes of communications already in place between the U.S. and Cuba; and 5) carriers shall report the number of circuits activated by facility on June 30 and December 31 of each year and on the one-year anniversary of the notification by the Commission in the Federal Register.

3. To the extent that the Policy Guidelines apply to COMSAT, we find that COMSAT's proposal is in compliance. As the U.S. Signatory to INTELSAT, COMSAT provides space segment capacity pursuant to tariffs filed with the Commission. Because COMSAT provides only the U.S. half-circuit of INTELSAT space segment to U.S. carriers and authorized users for transmission to Cuba, COMSAT is not engaged in the settlements process or in any other financial transactions with Cuba. Therefore, provisions in the Policy Guidelines relating to settlements and blocked accounts are not applicable to COMSAT. With respect to the requirement that proposals have the potential to be operational within a year and utilize facilities already in place, COMSAT states that INTELSAT spacecraft in the Atlantic Ocean Region are capable of providing service using existing INTELSAT satellites. Finally, although the Policy Guidelines state that circuits to Cuba are to be specifically authorized, this provision applies to COMSAT's carrier customers, which must obtain operating agreements with Cuba and participate in settlements, unlike COMSAT which only will provide the U.S. half-circuit. Therefore, the Commission will monitor the number of circuits and the financial transactions involving Cuba through our authorization of COMSAT's U.S. carrier customers.

4. Pursuant to the Policy Guidelines, the Commission recently authorized IDB WorldCom Services, Inc. ("IDB") to provide direct telex services, and Sprint Communications Company ("Sprint") to provide direct packet data services, to Cuba using facilities leased from COMSAT.[2] The Commission also has pending applications from five U.S. carriers to provide switched voice and private line services to Cuba also using facilities leased from COMSAT.[3] In view of the Commission's grant of authority to IDB and Sprint to provide direct telex and data service between the United States and Cuba using facilities leased from COMSAT, we find that the present and future public convenience and necessity will be served by a grant of COMSAT's application to provide space segment capacity to IDB and Sprint. We also find the public interest would be served by granting COMSAT's request for blanket authority to provide space segment services to any carrier once it is authorized by the Commission to provide public switched voice, data and/or private line services between the United States and Cuba.[4] We will limit, however, COMSAT to providing to carriers only the type and amount of space segment that the carrier is specifically authorized by the Commission to use. Therefore, for the reasons discussed above, we conclude that grant of COMSAT's application will promote the goals of the Cuban Democracy Act regarding telecommunications between the United States and Cuba as implemented in the Policy Guidelines.

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[1] Letter dated July 22, 1993, from Richard C. Beaird, Acting U.S. Coordinator and Director, Bureau of International Communications and Information Policy, U.S. Department of State to FCC Chairman James H. Quello.

[2] *IDB WorldCom Services, Inc.*, File No. I-T-C-94-211, 9 FCC Rcd 1865 (1994); *Sprint Communications Company, L.P.*, File No. I-T-C-94-238, DA 94-636, released June 22, 1994.

[3] The following U.S. carriers have applications pending with the Commission to provide direct switched voice and private line services to Cuba: WilTel International, Inc. (File No. I-T-C-94-227); MCI Telecommunications Corp. (File No. I-T-C-94-228); LDDS Communications, Inc. (File No. I-T-C-94-229); Sprint Communications Company L.P. (File No. I-T-C-94-247) and IDB WorldCom Services, Inc. (File No. I-T-C-94-260).

[4] Authorizing COMSAT blanket authority to provide service to any carrier authorized by the Commission will ensure that COMSAT is able to accommodate service requests without delay.

5. Accordingly, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, IT IS ORDERED that the application of COMSAT Corporation, File No. I-T-C-94-272, IS GRANTED and COMSAT is authorized to:

a. provide SCPC capacity (one 9.6 kbps analog circuit) to IDB between a Standard A earth station at Roaring Creek, Pennsylvania and the INTELSAT AOR satellite located at 325.5^0 E.L., connecting with a matching half-circuit furnished by IDB's correspondent in Cuba, for the provision of direct telex service between the U.S. and Cuba;

b. provide one 2-Mbps digital satellite circuit to Sprint between the Orion international Standard A earth station located at Shenandoah, Virginia and the INTELSAT AOR satellite located at 335^0 E.L. connecting with matching half-circuits furnished by Sprint's correspondent in Cuba, for the provision of direct packet data service between the U.S. and Cuba; and

c. provide appropriate space segment capacity via INTELSAT satellites located at 325.5^0, 329^0, 332.5^0 and 335.5^0 E.L. to any U.S. carrier authorized by the Commission to acquire such capacity from COMSAT for the provision of public switched voice and data, and private line telecommunications services between the U.S. and Cuba.

6. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that COMSAT shall file and have in effect a tariff for the services authorized in this order before offering services to authorized U.S. carriers.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MOBIL TELECOMMUNICATION TECHNOLOGIES CORP. File No. I-T-D-94-012

Application for authority to close public coast station KLG281, Nashville, Tennessee.

ORDER AND AUTHORIZATION

Adopted: July 28, 1994; Released: August 12, 1994

By the Chief, International Facilities Division:

1. The above-captioned application filed on June 3, 1994 by Mobil Telecommunication Technologies Corp. (Mtel) requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from public coast station KLG281, Nashville, Tennessee. The station provides marine service to the inland waterway and lakes in the vicinity of Nashville, Tennessee. The application was placed on public notice on June 15, 1994. No comments were received.

2. The basic statutory test to be applied by this Commission in considering applications for discontinuance of common carrier services to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. In support of its application, Mtel states that traffic via the station has declined significantly in the recent past, with the station handling only a few calls per month over the past two years. Mtel further states that adequate service is available in the area via cellular communications, and that the U.S. Coast Guard maintains safety and distress communications services throughout the entire coverage area of public coast station KLG281.

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversley affected by the discontinuance of service via public coast station KLG281.

5. Accordingly, IT IS ORDERED that application File No. I-T-D-94-012 IS GRANTED, and Mtel is authorized to discontinue service via public coast station KLG281.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.114 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] *Public Coast Radiotelegraph Stations*, 67 FCC 2d 790 at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

A. LAWRENCE GIGNAC File No. I-T-D-94-013

Application for authority to close
public coast station KSK283,
St. Joseph, Michigan.

ORDER AND AUTHORIZATION

Adopted: July 28, 1994; Released: August 12, 1994

By the Chief, International Facilities Division:

1. The above-captioned application filed on June 13, 1994 by A. Lawrence Gignac requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from public coast station KSK283, St. Joseph, Michigan. The station provides marine service to a small portion of Lake Michigan adjacent to St. Joseph. The application was placed on public notice on June 22, 1994. No comments were received.

2. The basic statutory test to be applied by this Commission in considering applications for discontinuance of common carrier services to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. In support of his application, Mr. Gignac states that traffic via the station has declined significantly in the recent past, as a result of his customers' switching to cellular service due to the difference in price structure between the two services. Mr. Cignac further states that adequate service is available in the area via cellular communications, and that the U.S. Coast Guard maintains safety and distress communications services throughout the entire coverage area of public coast station KSK283.

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversley affected by the discontinuance of service via public coast station KSK283.

5. Accordingly, IT IS ORDERED that application File No. I-T-D-94-013 IS GRANTED, and A. Lawrence Gignac is authorized to discontinue service via public coast station KSK283.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.114 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] *Public Coast Radiotelegraph Stations*, 67 FCC 2d 790 at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEFONICA LARGA DISTANCIA
DE PUERTO RICO, INC.

Application for authority to acquire and operate facilities for direct service between Puerto Rico, the U.S. Virgin Islands, and the Bahamas.	File No. I-T-C-92-242
Application for authority to acquire and operate facilities for direct service between Puerto Rico, the U.S. Virgin Islands, and the Netherlands.	File No. I-T-C-93-033
Joint Section 214 applications and applications for submarine cable landing licenses for COLUMBUS II and AMERICAS-1 Cable Systems.	File Nos.I-T-C-93-029 I-T-C-93-030 S-C-L-93-001 S-C-L-93-002

MEMORANDUM OPINION, ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 29, 1994; Released: August 8, 1994

By the Commission:

1. Telefonica Larga Distancia de Puerto Rico, Inc. (TLD) has filed the above-captioned applications for authority pursuant to Section 214 of the Communications Act of 1934, as amended (the Act), to acquire and operate facilities for direct service to the Bahamas and the Netherlands. We grant these applications for the reasons discussed below. In this order we also grant TLD's request for authority to participate in the construction, acquisition of capacity in, and operation of the COLUMBUS II and AMERICAS-1 Cable Systems, but defer ruling on TLD's request for authority to acquire capacity in the COLUMBUS II Cable System for service to Spain.

I. APPLICATIONS

2. *The Bahamas.* TLD requests authority to provide its regularly authorized international services, including International Message Telephone Service (IMTS) and operator-assisted traffic, to the Bahamas from Puerto Rico and the U.S. Virgin Islands on a direct facilities basis.[1] TLD proposes to transmit traffic from Puerto Rico to Florida via Segment F of the TCS-1 Cable System, using six of the 150 circuits that TLD currently is authorized to use for the provision of international services. From Florida, the traffic would be transmitted via six circuits in the Florida-Bahamas Cable System (FLOBA) to the Bahamas. This application was placed on public notice August 26, 1992. AT&T of Puerto Rico, Inc. (AT&T-PR) filed comments, to which TLD responded.

3. In response to our request for additional information, TLD amended its application on December 14, 1992, to withdraw its request for authorization to provide private line services to the Bahamas. TLD also stated that BATELCO (TLD's correspondent in the Bahamas) would provide six whole FLOBA circuits between the Bahamas and Florida for interconnection with TLD's six whole circuits in the TCS-1 Cable System that carry traffic between Puerto Rico and Florida. TLD represents that all of the traffic carried over these facilities would originate and terminate in the Bahamas, Puerto Rico, or the U.S. Virgin Islands with the Florida landing point serving only to interconnect the two separate cable systems. TLD characterizes this arrangement as equivalent to the typical situation in which two correspondents provide half-circuits in a single cable system. The difference in this case is that there would be an intermediate landing/interconnection point in Florida. TLD does not state, however, that under this arrangement, both parties would share equally in the costs of providing the requested services between the Bahamas and Puerto Rico or the U.S. Virgin Islands. We do not believe the public interest is served when a U.S. carrier is required by a foreign correspondent to pay more than half of the costs of providing service between two countries and TLD has failed to demonstrate that such will not be the case here. We therefore require as a condition of this authorization that TLD and BATELCO enter into a normal correspondent relationship under which both parties would acquire half-circuits for the entire route from Puerto Rico or the U.S. Virgin Islands to the Bahamas.

4. *The Netherlands.* TLD also requests authority to provide TLD's regularly authorized international services, including IMTS and operator-handled traffic, to the Netherlands on a direct facilities basis.[2] TLD plans to use existing facilities to provide services between Puerto Rico, the U.S. Virgin Islands, and the Netherlands. Traffic originating in both Puerto Rico and the U.S. Virgin Islands[3] would be transmitted from Puerto Rico to the Netherlands on Telecomunicaciones Ultramarinas de Puerto Rico's (TUPR's) Humacao Type A international earth station, via six half-circuits on the INTELSAT Atlantic Ocean Region satellite located at 335.5^0 East Longitude.[4] This application was placed on public notice November 25, 1992 and no

[1] FCC File No. I-T-C-92-242.
[2] FCC File No. I-T-C-93-033. TLD originally requested authority to provide private line services, but withdrew its request on March 18, 1993 in its opposition to AT&T's petition to deny.
[3] TLD proposes to use its existing authorized facilities, including the TAINO-CARIB Cable System or its leased microwave channels from American Telephone and Telegraph Company (AT&T), to carry traffic between Puerto Rico and the U.S. Virgin Islands for exchange with the Bahamas and the Netherlands.
[4] TUPR is a Puerto Rico corporation owned 85.1% by the Puerto Rico Telephone Authority and 14.9% by Telefonica In-

timely comments were received. Months after the pleading cycle had closed, AT&T filed a Petition to Deny against both the Bahamas and the Netherlands applications. AT&T's petition commenced another round of pleadings.[5]

5. *COLUMBUS II and AMERICAS-1.* Finally, TLD requests approval of its proposal to acquire ownership interests in the COLUMBUS II and AMERICAS-1 Cable Systems.[6] On November 10, 1992, eight U.S. carriers, including TLD's predecessor,[7] filed joint applications pursuant to Section 214 of the Communications Act and the Cable Landing License Act[8] for authority to construct, acquire capacity in, and operate the COLUMBUS II and AMERICAS-1 Cable Systems (Joint Applications). On July 28, 1993, the Common Carrier Bureau approved the Joint Applications for these cable systems for seven U.S. carriers, but deferred action on TLD's applications pending a determination by the full Commission.[9] The Bureau found that TLD's proposed ownership interest raised complex and novel issues, involving international market access, self-correspondency, and the reciprocity requirements of the Cable Landing License Act.[10] The Bureau therefore referred this issue to the Commission.

6. In response, TLD filed an application for review requesting that the Commission quickly grant its cable applications. AT&T opposed TLD's application for review on the grounds that it was procedurally defective. AT&T also argued that grant of additional facilities to TLD would not serve the public interest. On April 20, 1994, TLD filed a motion for expedited consideration of its cable applications, stating that the AMERICAS-1 and COLUMBUS II cables were scheduled to begin operation on September 1, 1994, and December 1, 1994, respectively, and TLD needed a prompt grant of its applications to avoid irreparable harm. AT&T supported TLD's request for prompt action, but reiterated its request that the Commission deny TLD's applications for the COLUMBUS II and AMERICAS-1 Cable Systems. In reply to AT&T, TLD submitted additional comments, including an economic analysis and letters from its customers, to support its position that grant of TLD's applications would greatly benefit both TLD and the residents of Puerto Rico.

II. DISCUSSION

7. In approving Telefonica's entry into the U.S. market through TLD, its subsidiary, we stated that "[d]ue to the unique public interest and market factors associated with international facilities-based authorizations, ... facilities applications from entities affiliated with foreign carriers [such as TLD] will require review and approval by the full Commission. Each application will be evaluated on a case-by-case basis."[11] The above-captioned applications present our first opportunity to consider the grant of additional facilities-based authority to TLD.[12]

8. AT&T opposes the applications for facilities to the Bahamas[13] and the Netherlands on the grounds that TLD is seeking authority that exceeds the limits imposed by the Commission in the *TLD Order*. AT&T states that TLD's access to the U.S. international services market will be expanded if TLD is allowed to provide the additional facili-

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ternational Holding, the controlling shareholder of TLD. TUPR is a carrier's carrier, offering use of earth stations and point-to-point microwave radio facilities to TLD and other common carriers under tariff. TUPR does not offer end-to-end services and is not a party to any operating agreements. *See Telefonica Larga Distancia, et al.*, File No. I-T-C-92-116-AL, 8 FCC Rcd 106, 107 (1992)(*TLD Order*).

[5] On March 5, 1993, AT&T filed petitions to deny applications I-T-C-92-242 and I-T-C-93-033, and requested that we accept its late filings. TLD opposed the petitions, AT&T replied, and TLD filed an additional response. Although AT&T's petitions are untimely, in order to develop a complete record on the issues, we find that the public interest would be served by including them, and the subsequent pleadings, in the record as informal comments.

[6] The COLUMBUS II Cable System extends from stations in: Cancun, Mexico; West Palm Beach, Florida; St. Thomas, U.S. Virgin Islands; Sardinia, Spain; Palermo, Italy; and Funchal, Portugal. The AMERICAS-1 Cable System connects cable stations in: Fortaleza, Brazil; Camuri, Venezuela; Macqueripe, Trinidad; West Palm Beach, Florida; and St. Thomas, U.S. Virgin Islands. TLD's proposed combined ownership interest in both cables is 63 whole MIUs (Minimum Investment Units - approximately thirty 64 kbps voice paths) to the U.S. Mainland, 2 joint MIUs to Hawaii, 3 joint MIUs to Spain, 3 joint MIUs to Canada, 3 joint MIUs to Venezuela, 2 joint MIUs to Mexico, 1 joint MIU to Germany, 1 joint MIU to Italy, 1 whole MIU to Portugal, 1 joint MIU to Brazil and 1 joint MIU to Trinidad. TLD has stated it does not intend to use digital circuit multiplication equipment with these circuits. These facilities constitute for TLD an approximately 1.47 percent equity interest in COLUMBUS II and a 1.72 percent equity interest in AMERICAS-1.

[7] Prior to December 1992, TLD's interests in the cable applications were owned by a similarly named company, Telefonica Larga Distancia de Puerto Rico (Former TLD). Former TLD was a wholly-owned subsidiary of the Puerto Rico Telephone Authority, a public authority of the Commonwealth of Puerto Rico. On December 18, 1992, the Commission approved the assignment of these cable interests to TLD, a subsidiary of Telefonica de Espana (Telefonica), the monopoly carrier in Spain which is controlled by the Spanish Government. *See TLD Order*, 8 FCC Rcd 106.

[8] "An Act Relating to the Landing and Operation of the Submarine Cables in the United States," 47 U.S.C. §§ 34-39 (Cable Landing License Act).

[9] *American Telephone and Telegraph Company et al.*, File No. I-T-C-93-029, 8 FCC Rcd 5263 (1993)(*COLUMBUS II § 214 Order)* at ¶ 9; *American Telephone and Telegraph Company et al.*, File No. I-T-C-93-030, 8 FCC Rcd 5287 (1993)(*AMERICAS-1 § 214 Order)* at ¶ 10; *American Telephone and Telegraph Company et al.*, File No. S-C-L-93-001, 8 FCC Rcd 5038 (1993)(*COLUMBUS II Landing License)* at ¶ 10; *American Telephone and Telegraph Company et al.*, File No. S-C-L-93-002, 8 FCC Rcd 5041 (1993)(*AMERICAS-1 Landing License)* at ¶ 9.

[10] *See* decisions cited, *supra* n.9.

[11] *TLD Order*, 8 FCC Rcd at 113.

[12] TLD currently has pending an application for additional microwave facilities to the Dominican Republic (File No. I-T-C-94-252). TLD is already authorized to provide IMTS between Puerto Rico/U.S. Virgin Islands and the Dominican Republic using microwave, cable and satellite facilities. TLD is requesting authority to use additional microwave circuits, in lieu of its authorized satellite circuits. Because TLD is not requesting an increase in the overall number of its authorized circuits to the Dominican Republic, this application is not the type of facilities application that requires review by the full Commission. Therefore, we delegate to the Common Carrier Bureau authority to act on this application.

[13] AT&T's subsidiary, AT&T-PR also commented on TLD's application for service to the Bahamas. AT&T-PR asks the Commission to impose a condition on grant of TLD's application that prohibits TLD from accepting special concessions from other carriers. AT&T-PR's request is unnecessary since TLD is already subject to this condition, pursuant to Section 63.14 of the Commission's Rules, 47 C.F.R. § 63.14.

ties-based services requested in these applications. AT&T argues that grant of TLD's applications will not further any of the public interest factors cited in the *TLD Order*, nor any new public interest factors such as liberalization of telecommunications markets in Spain. In addition, AT&T states that TLD's applications raise broader policy issues of market access. AT&T contends that these important issues should not be evaluated and resolved on a case-by-case basis in the context of individual Section 214 applications. Instead, AT&T requests that the Commission defer acting on these applications until the National Telecommunications and Information Administration (NTIA) completes its Notice of Inquiry (NTIA Inquiry)[14] examining the United States' market-entry policies. AT&T argues that Commission action prior to completion of the NTIA Inquiry would be premature, could undermine the NTIA effort, and could be detrimental to wider U.S. interests.[15]

9. AT&T opposes TLD's application for review of the Bureau's COLUMBUS II and AMERICAS-1 cable orders on the grounds that TLD's application fails to demonstrate any basis, as required by Section 1.115(b)(2) of the Commission's Rules,[16] for overturning the decision of the Common Carrier Bureau. AT&T argues that, because the Bureau deferred TLD's applications for consideration by the full Commission, the Bureau provided for exactly the relief TLD seeks by its Application for Review -- separate consideration of the merits of its applications by the Commission. TLD counters that it has explicitly argued grounds that come within the scope of Section 1.115(b)(2). In particular, under Section 1.115(b)(2)(i), TLD argues that the Bureau's decision conflicted with case precedent and Commission policy established in the *TLD Order*. Under Section 1.115(b)(2)(ii), TLD states that the question of how the Commission should proceed in resolving the question of cable facilities connecting TLD and its parent is a question of policy that the Commission has not previously resolved. Finally, under Section 1.115(b)(2)(v), TLD argues that the procedure followed by the Bureau is prejudicial to TLD.

10. We conclude that TLD's Application for Review is properly before us because TLD has specified with particularity several of the factors listed in Section 1.115(b)(2) which TLD believes warrant Commission consideration. We also conclude, however, that the Bureau acted correctly in deferring to us consideration of TLD's ownership interests in the COLUMBUS II and AMERICAS-1 cable systems. We believe the Bureau's actions were consistent with the policy established in the *TLD Order* requiring full Commission approval of any future TLD facilities applications. The Bureau acted reasonably in exercising its delegated authority,[17] to approve the other U.S. carriers' participation in the cable systems because this action did not raise new policy issues that had not previously been addressed by the Commission and was consistent with precedent. In addition, this action allowed the construction of the cables to commence expeditiously during the Commission's review of the issues associated with TLD's proposed ownership interests. Finally, the Bureau's actions were not prejudicial to TLD because TLD's ownership interests in the cables were protected during the Commission's review. We grant TLD's Application for Review to the extent that later in this order we approve TLD's ownership interests in the cables, except for the interests in the COLUMBUS II cable for service to Spain.

11. In its opposition to TLD's Application for Review, AT&T further argues that to the extent we consider the merits of TLD's applications, we should exercise our discretion under the reciprocity provisions of the Cable Landing License Act[18] and the public interest requirements of Section 214 of the Communications Act to deny TLD's applications. AT&T states that if TLD's applications are granted, Telefonica will continue, through TLD, to receive more favorable treatment for providing service to U.S. customers than U.S. carriers are afforded in attempting to offer service to Spanish customers. In particular, Telefonica would be permitted to own both ends of the COLUMBUS II and AMERICAS-1 cables and provide service to U.S. customers using these facilities, while U.S. carriers are barred from owning the Spanish end of international cables and from providing long distance service to Spanish customers.[19]

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[14] Department of Commerce, National Telecommunications and Information Administration, "Comprehensive Examination of U.S. Regulation of International Telecommunications Services," Notice of Inquiry, 58 Fed. Reg. 4836 (January 15, 1993).

[15] AT&T's request for deferral was first raised in the context of these applications in its reply to TLD's opposition. As a result, TLD requested, pursuant to Section 1.45(c) of the Commission's Rules, leave to file a response to AT&T's reply. Because AT&T's reply raised new arguments and new factual assertions, we grant TLD's request to respond and include its pleading in the record of this proceeding.

[16] 47 C.F.R. § 1.115(b)(2). "...[T]he application for review shall specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented: (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy. (ii) The action involves a question of law or policy which has not previously been resolved by the Commission. (iii) The action involves application of a precedent or policy which should be overturned or revised. (iv) An erroneous finding as to an important or material question of fact. (v) Prejudicial procedural error.

[17] Pursuant to Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, the Common Carrier Bureau has been delegated authority to act on routine applications for international submarine cable landing licenses and the associated Section 214 authorizations.

[18] The Cable Landing License Act gives the President of the United States broad discretion to grant, withhold, condition or revoke cable landing licenses if the President determines "after due notice and hearing that such action will assist in securing rights for the landing or operation of cables in foreign countries, or maintaining the rights or interests of the United States or of its citizens in foreign countries." *See* Section 2 of the Cable Landing License Act, 47 U.S.C. §35. By executive order, the Commission has been delegated the actual responsibility for issuing cable landing licenses. *See* Executive Order No. 10530, dated May 10, 1954, 3 U.S.C.A. §301 at p. 1052 (1985). This delegated authority is subject to the proviso, however, that the Commission may not act on such licenses without first obtaining approval from the Secretary of State, and advice from any executive branch department or establishment of the government it may deem necessary.

[19] AT&T also reiterated these arguments in its comments on TLD's motion for expedited consideration and in general in a petition for rulemaking requesting that we adopt a market entry standard for all foreign carriers seeking to enter the U.S. mar-

12. Further, AT&T contends that the nondiscrimination conditions we imposed in the *TLD Order* do not address the abuse the Cable Landing License Act's reciprocity provision was designed to prevent – the treatment of U.S. companies and citizens abroad less favorably than foreign companies and citizens are treated in the United States. AT&T states that although safeguards may prevent discrimination by a monopoly foreign carrier in favor of its U.S. affiliate, they do nothing to foster equivalent opportunity for U.S. carriers in Spain. Therefore, AT&T argues that we cannot rely solely upon the reasoning in the *TLD Order* to govern this situation, but must apply the reciprocity provisions of the Cable Landing License Act. Specifically, AT&T asserts that the Commission must require Spain to provide comparable market access to U.S. carriers before granting TLD authority to participate in the COLUMBUS II and AMERICAS-1 cables.

13. We address first AT&T's argument that TLD must show public interest factors comparable to those present in the *TLD Order* before TLD's limited authority can be expanded. It appears this argument relates not only to the applications for facilities to the Bahamas and the Netherlands, but any TLD application for additionalauthority, including the COLUMBUS II and AMERICAS-1 cable applications. The primary issue presented by the *TLD Order* was whether the public interest would be served by approving Telefonica's acquisition of TLD. Our public interest analysis in the *TLD Order* focused mainly on the issue of whether TLD's foreign carrier affiliation made it possible for TLD to engage in anticompetitive conduct that could cause harm to other U.S. carriers.[20] We concluded that properly designed safeguards could protect against TLD acting in concert with Telefonica or any other foreign carrier to discriminate against U.S. carriers in the terms and conditions of access to foreign markets for the origination and termination of U.S. international traffic. We also noted that, in this particular instance, the potential for anticompetitive harm to U.S. carriers was mitigated by the underlying facts surrounding the assignment. Specifically, the applications involved a limited number of circuits, traffic would originate only from Puerto Rico and the U.S. Virgin Islands, and no interconnected private line service would be involved. All of these factors, when balanced against potential discrimination concerns, led us to conclude that a conditioned grant best served the public interest and should prevent unlawful discrimination.[21]

14. The unique public interest factors AT&T cites, *i.e.*, the privatization of TLD, and the allocation of the sale proceeds to education in Puerto Rico, also were critical to our decision to allow Telefonica to enter the U.S. market despite the fact that Spain's market is closed in substantial part to U.S. carriers. Contrary to AT&T's position, however, we did not state, nor did we intend to imply, that TLD would have to show comparable public interest factors to support each expansion of the authority granted in the *TLD Order*. Now that the acquisition of TLD is complete, we agree with TLD that the crucial question to be addressed in our review of applications for additional facilities and services to unaffiliated countries[22] is whether the authority requested by TLD poses an additional risk of anticompetitive behavior, and, if so, whether the safeguards we have in effect are sufficient to protect against that risk. Indeed, in the *TLD Order* we specifically established procedures so that if TLD sought to expand its U.S. international service offerings or capabilities, the Commission would review the applications and attach additional conditions, if warranted, to protect against unfair competition.[23] Under this standard, we find that the public interest would be served by granting all of these applications, except for the cable facilities to Spain. Excluding the latter, TLD's applications seek a limited expansion of TLD's existing authority and are unlikely to serve as a vehicle for market abuse or anticompetitive conduct. Excluding the requested facilities to Spain, TLD has not requested authority either to provide any new services to, or to serve on a direct facilities basis, any new affiliated countries. The only new countries TLD seeks to serve on a direct facilities basis are the Netherlands and the Bahamas, countries where neither TLD nor Telefonica has an ownership interest in the local operating carriers.

15. Further, the number of additional circuits that TLD would be authorized to use to deliver traffic to international points is very limited. More than 80 percent of TLD's capacity in the cables would be used for domestic service to the U.S. Mainland and Hawaii. The remaining capacity would be used to serve international points that TLD already has authorization to serve on a direct facilities basis. Authorization of circuits to the Bahamas and the Netherlands does not pose any new potential opportunities for discrimination or unfair competition by TLD not already addressed by the safeguards contained in the *TLD Order*. In addition, grant of these applications will increase the number of carriers offering direct facilities-based services from the Puerto Rico-U.S. Virgin Islands market to the Netherlands and the Bahamas. Grant of these applications also will enable TLD to operate more efficiently and effectively to those countries that it is currently serving on a resale basis or via more expensive satellite facilities, thus encouraging lower rates and improved service for the public.

16. We now address AT&T's argument that the COLUMBUS II and AMERICAS-1 cable applications raise a separate issue that was not addressed by the *TLD Order*, namely the reciprocity provision of the Cable Landing License Act. We reject AT&T's argument that the Cable Landing License Act requires a reciprocity determination in this instance. The reciprocity provision of the Cable Landing License Act gives us the discretion to withhold cable landing licenses in the absence of reciprocity, but does not require that we do so. For instance, in the *TLD Order* we did not exercise the option of requiring reciprocity despite the fact that cable landing licenses were involved

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ket. *See Market Entry and Regulation of International Common Carriers with Foreign Carrier Affiliations*, RM-8355, AT&T Petition for Rulemaking, filed September 22, 1993.

[20] *TLD Order*, 8 FCC Rcd at 109-113.

[21] *TLD Order*, 8 FCC Rcd at 113.

[22] An "unaffiliated country" is one in which neither TLD, Telefonica, nor any other carrier under common control has a controlling interest in an entity that owns or controls bottleneck facilities in that country. *See Regulation of International Common Carrier Services*, 7 FCC Rcd 7331, 7332 (1992), *errata*, DA 93-26, released January 19, 1993.

[23] *See TLD Order*, 8 FCC Rcd at 113. In addition, we emphasized that, as part of the nondiscrimination safeguards imposed on TLD, we would have the opportunity to monitor closely the addition of any circuits to countries where TLD is affiliated with a foreign carrier. *Id.*

in the assignment.[24] We found that the facts did not require the additional condition of reciprocal entry for U.S. carriers in Spain in order to "[maintain] the rights or interests of the United States or of its citizens in foreign countries" within the meaning of the Cable Landing License Act. Moreover, the State Department, in its review of the assignment application, concluded that since none of the cables involved landed in Spain or interconnected with cables landing in Spain, the Department was not required to consider the elements of a direct reciprocity standard at that time.[25]

17. Here, the State Department, after coordinating with the Department of Defense and the Department of Commerce (NTIA), has again approved TLD's acquisition of direct international cable facilities, with the exception of circuits connecting to Spain. The Department stated that it approved TLD's ownership interests in the COLUMBUS II and AMERICAS-1 cables on the condition that the Commission defer action on TLD's portions of the cable system designated for service to Spain (three jointly assigned MIUs) and related Section 214 authority for providing service to Spain, pending further review by the State Department and the Commission.[26] With respect to the circuits to Spain, the Department stated that it would review the potential risk of anticompetitive leveraging and discrimination against competing U.S. carriers that might result because of TLD's affiliation with Telefonica. This approach is entirely consistent with the framework we devised in the *TLD Order* for reviewing additional requests for authority by TLD.

18. In summary, we find that although the Cable Landing License Act and Section 214 of the Act authorize us to require reciprocity when the public interest warrants, TLD's participation in the cables, except for service to Spain,[27] is a limited expansion of its authority granted in the *TLD Order*, and is fully subject to the safeguards established in that order. We therefore decline torequire a reciprocity showing.[28] Our decision here, however, is not meant to address AT&T's proposal for a market entry standard that would apply to all carriers with foreign affiliates. The merits of this broader proposal will be considered separately in the context of AT&T's Petition for Rulemaking.[29]

19. Finally, we address AT&T's requests that we defer action on these applications until the NTIA has completed its inquiry. We agree with TLD that our action on these applications should not await the completion of the NTIA proceeding. AT&T raised a similar argument in opposition to the original TLD acquisition, arguing that the Commission should have a comprehensive rulemaking regarding regulation of the entry of foreign carriers into the U.S. market before ruling on TLD's applications. As we stated in the *TLD Order*, we have the authority to resolve facilities-based applications by TLD on a case-by-case basis, assuring in each case that any particular issues raised by additional applications are fully aired.[30] These applications involve only a limited expansion of authority to TLD to countries where it does not have an affiliated carrier. We find that the issues raised by these applications are not materially different from those raised in the *TLD Order*, that they have been fully addressed by the parties, and are ripe for decision. We found in the *TLD Order* that the provision of these limited services by TLD is in the public interest.[31] Therefore, we do not find that granting these applications would set any new precedent, or have any material effect on the NTIA Inquiry. NTIA is aware of these applications, has not asked that we delay action until completion of its inquiry, and in fact concurred with the Department of State's approval of these cable applications, except for TLD's ownership interests to Spain. Further, the question of whether Telefonica should be granted access to the U.S. market has already been decided by this Commission in the *TLD Order*.[32] As we found in the *TLD Order*, we conclude that these additional grants of authority to TLD serve the public interest. We further conclude that the safeguards we imposed in granting the assignment application will provide effective protection against anticompetitive conduct by TLD.[33] We reiterate, however, our commitment made in the *TLD Order* to review in three years from the grant of that order the effectiveness of the nondiscrimination safeguards we have adopted and to consider in the context of that review whether the extent of competitive entry in TLD's affiliated markets is sufficient to protect against the abuse of market power.[34]

20. In conclusion, we find that a limited expansion of TLD's authority is in the public interest and is unlikely to lead to abuse of market power or anticompetitive conduct. Grant of these applications will increase the number of carriers offering direct facilities-based services from the Puerto Rico-U.S. Virgin Islands market to the Netherlands and the Bahamas. Grant of these applications also will enable TLD to operate more efficiently and effectively to those countries that it is currently serving on a resale basis or via more expensive satellite facilities, thus encouraging lower rates and improved service for the public. We further conclude that existing regulatory safeguards imposed on TLD because it is owned by Telefonica are sufficient to prevent potential discriminatory practices that would damage effective competition. We, however, defer ruling on

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[24] Among the facilities transferred in the *TLD Order* were ownership interests in two Caribbean cable systems, TAINO-CARIB Cable System and the TCS-1 Cable System. *See TLD Order* at Appendix A.

[25] *See TLD Order*, 8 FCC Rcd at 110.

[26] *See* Letter to Kathleen Levitz, Acting Chief, Common Carrier Bureau, Federal Communications Commission, from Michael T. N. Fitch, Acting United States Coordinator and Director, Bureau of International Communications and Information Policy, United States Department of State, dated June 30, 1993.

[27] Under the Cable Landing License Act, we cannot consider the issues associated with TLD's request for circuits to Spain on the COLUMBUS II Cable System until the Commission receives from the State Department its comments on this aspect of TLD's application.

[28] We stress, however, that TLD's entry into the U.S. Mainland market, which would allow it to compete for U.S. international and domestic traffic, would require a major expansion of its existing authority. We note that we recently approved the acquisition of a U.S. international carrier on the U.S. Mainland by ENTEL, a Chilean carrier, after the parties demonstrated, among other factors, there were effective opportunities for U.S. carriers to compete with ENTEL in its home market. *See AmericaTel Inc.*, FCC 94-175, adopted June 28, 1994.

[29] *See supra* n.19.

[30] *TLD Order*, 8 FCC Rcd at 109.

[31] *See supra* ¶ ¶ 13-14.

[32] *TLD Order*, 8 FCC Rcd at 116.

[33] *Id.*

[34] *Id.* at 113.

TLD's proposed ownership interest in cable circuits to Spain until we receive the views of the State Department. Therefore, we will grant the above-captioned applications, except for the circuits to Spain.

III. ORDERING CLAUSES

21. Upon consideration of the subject applications, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of direct service between Puerto Rico/U.S. Virgin Islands and the Bahamas and the Netherlands by TLD, and the participation of TLD in the construction, acquisition of capacity in, and operation of the COLUMBUS II and AMERICAS-1 Cable Systems.

22. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-92-242, I-T-C-93-033, I-T-C-93-029, I-T-C-030, S-C-L-93-001 and S-C-L-93-002 ARE GRANTED, and TLD is authorized to:

a. acquire by lease or Indefeasible Right of Use and operate six voice-grade half-circuits in the FLOBA Cable System, matching with facilities furnished by BATELCO;

b. activate and operate six half-circuits of the 150 voice-grade circuits that TLD owns and is authorized to operate on Segment F of the TCS-1 Cable System between Puerto Rico and Florida, matching with facilities furnished by BATELCO, and connecting with the FLOBA Cable System;

c. activate and operate six of the voice-grade half-circuits it owns in the TAINO-CARIB Cable System, or six of the voice-grade half-circuits it has been previously authorized to lease in AT&T's microwave facilities, between Puerto Rico and the U.S. Virgin Islands, matching with facilities furnished by BATELCO, and connecting with similar circuits in the TCS-1 Cable System in Puerto Rico;

d. lease from Comsat and operate 6 voice-grade satellite half-circuits between the TUPR Humacao, Puerto Rico Type A international earth station and the INTELSAT Atlantic Ocean Region satellite located at 335.5^0 East Longitude, connecting with similar half-circuits between the satellite and an earth station in the Netherlands furnished by TLD's correspondent in the Netherlands;

e. lease from TUPR and operate 6 voice-grade circuits in the Humacao earth station to be used in conjunction with the space segment capacity;

f. activate and operate six of the voice-grade whole circuits it owns in the TAINO-CARIB Cable System, or six of the voice-grade circuits it has been previously authorized to lease in AT&T's microwave facilities, between Puerto Rico and the U.S. Virgin Islands, matching with facilities owned by TLD's correspondent in the Netherlands, and connecting with similar circuits at the Humacao earth station in Puerto Rico;

g. use the facilities listed in a, b and c above to provide TLD's regularly authorized international services, excluding private line services, between the U.S. Virgin Islands, Puerto Rico and the Bahamas, and use the facilities listed in d, e, and f above to provide TLD's regularly authorized international services, excluding private line services, between the U.S. Virgin Islands, Puerto Rico and the Netherlands;

h. participate in the construction and operation of the COLUMBUS II and AMERICAS-1 Cable Systems as described in the Joint Applications, File Nos. I-T-C-93-029 and I-T-C-93-030, except for TLD's proposed ownership interests designated for service to Spain;

i. acquire and activate capacity in the COLUMBUS II and AMERICAS-1 Cable Systems, on an ownership basis, in accordance with the interests indicated being held in reserve for TLD in Appendix A of the *COLUMBUS II § 214 Order* and the *AMERICAS-1 § 214 Order*, except for TLD's proposed ownership interests designated for service to Spain;

j. acquire capacity, by lease, in such connecting facilities as may be required to extend capacity in the COLUMBUS II and AMERICAS-1 Cable Systems to Canada, Venezuela, Mexico, Germany, Italy, Portugal, Brazil and Trinidad; and

k. activate and operate capacity in the COLUMBUS II and AMERICAS-1 Cable Systems and aforementioned extension facilities for the provision of TLD's regularly authorized international services, excluding private line services, between Puerto Rico, the U.S. Virgin Islands and Canada, Venezuela, Mexico, Germany, Italy, Portugal, Brazil and Trinidad.

23. IT IS FURTHER ORDERED that the Cable Landing Licenses issued by this Commission in File No. S-C-L-93-001, *COLUMBUS II Landing License*, and File No. S-C-L-93-002, *AMERICAS-1 Landing License*, are AMENDED to add TLD as a licensee, subject to all the terms and conditions specified in those licenses, and on an ownership level consistent with this order.

24. IT IS FURTHER ORDERED that TLD is authorized to acquire, by lease, appropriate connecting facilities for the COLUMBUS II and AMERICAS-1 Cable Systems between the West Palm Beach, Florida, and Magens Bay, St. Thomas cable stations and its respective operating offices in Puerto Rico, and the U.S. Virgin Islands.

25. IT IS FURTHER ORDERED that the capacity assigned in the COLUMBUS II Cable System to TLD for service to Spain shall be held in reserve until such time as the Commission makes a determination as to TLD's authorized level of participation. The cable system ownership schedules shall be appropriately modified to reflect such treatment. If TLD is later permitted to participate, the capacity set aside shall be made available to TLD at the same cost and terms as available to the other original owners of the systems. Conversely, if TLD is not permitted to participate, any payments it has made shall be refunded to it with interest, and without financial penalties.

26. IT IS FURTHER ORDERED that TLD shall make available half-interests in the COLUMBUS II and AMERICAS-1 Cable Systems capacity to such present and future U.S. carriers as may be authorized by the Commission to acquire such capacity.

27. IT IS FURTHER ORDERED that the Commission retains jurisdiction to reallocate TLD's interest in capacity in the cable systems as the public interest may require and

with any requisite concurrence of the foreign administration or carriers concerned, in order to accommodate additional carriers or for other reasons.

28. IT IS FURTHER ORDERED that the Commission retains jurisdiction over all matters relating to TLD's ownership, management, maintenance and operation of the cable systems as authorized herein to ensure the most efficient use not only of this cable system but of all means of communications between the United States and the Atlantic Ocean Region.

29. IT IS FURTHER ORDERED that as long as TLD remains a dominant carrier pursuant to the Commission's decision in CC Docket No. 85-107 or CC Docket No. 91-360,[35] TLD shall neither dispose of any interest in COLUMBUS II or AMERICAS-1 capacity it is authorized to acquire to any entity on an ownership basis, nor dispose of any interest in any such capacity in any way to a non-U.S. telecommunications service provider without prior authorization by the Commission.

30. IT IS FURTHER ORDERED that TLD shall include COLUMBUS II and AMERICAS-1 facility use in the monthly Circuit Status Reports it is required to file pursuant to the Commission's Orders. These reports shall be filed no later than the 20th day of each month providing the information for the preceding month.

31. IT IS FURTHER ORDERED that in regard to TLD's use of satellite facilities to serve the Netherlands, the Commission retains jurisdiction to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

32. IT IS FURTHER ORDERED that neither TLD nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, that is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which TLD or any persons or companies controlling or controlled by TLD are parties.

33. IT IS FURTHER ORDERED that TLD shall file with the Commission copies of any operating agreements it enters into with its foreign correspondents in the Bahamas, the Netherlands, Canada, Venezuela, Mexico, Germany, Italy, Portugal, Brazil and Trinidad, with the Commission within 30 days of the execution of such agreements, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

34. IT IS FURTHER ORDERED that TLD shall not route traffic to or from third countries for which it does not have authorization under Section 214 of the Communications Act.

35. IT IS FURTHER ORDERED that TLD shall not bargain for nor agree to accept more than its proportionate share of return traffic from the Bahamas, the Netherlands, Canada, Venezuela, Mexico, Germany, Italy, Portugal, Brazil and Trinidad.

36. IT IS FURTHER ORDERED that TLD shall settle its international accounts in accordance with the nondiscriminatory accounting rate it is required to file with this Commission.

37. IT IS FURTHER ORDERED that TLD shall comply with any current and future Commission policies and requirements concerning international accounting and settlement rates and shall file copies of any operating agreements entered into by TLD or its parent/affiliates that affect traffic or revenue flows to or from the United States within 30 days of its execution.

38. IT IS FURTHER ORDERED that TLD shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the United States and each country TLD is authorized to serve, including the Bahamas and the Netherlands, within 90 days from the end of each calendar quarter.

39. IT IS FURTHER ORDERED that TLD shall file tariff provisions pursuant to Section 203 of the Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

40. IT IS FURTHER ORDERED that TLD shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

41. IT IS FURTHER ORDERED that TLD shall seek, pursuant to Section 63.01 of the rules, additional authorization under Section 214 of the Communications Act before adding or deleting circuits to the Bahamas and the Netherlands, or before otherwise using the circuits authorized in this order in a manner other than as specified for the provision of the services authorized herein.

42. IT IS FURTHER ORDERED that, pursuant to Section 63.05 of the Commission's Rules, the authorizations for the COLUMBUS II and AMERICAS-1 facilities (an expenditure of more than $500,000) shall terminate after 12 months of the release date of this order if the authorized facilities have not been acquired, or 36 months if all or part of the authorized facilities have not been placed into operation. For the facilities to reach the Bahamas and the Netherlands, (an expenditure of less than $500,000), these authorizations shall terminate after nine months of the release date of this order if construction has not commenced on the authorized facilities, or 18 months if the authorized facilities have not been placed into operation.

43. IT IS FURTHER ORDERED that AT&T's motions to accept late-filed petitions to deny against TLD's applications I-T-C-92-242 and I-T-C-93-033 ARE GRANTED to the extent that AT&T's petitions will be accepted into the record as informal comments pursuant to Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41.

44. IT IS FURTHER ORDERED that TLD's motion for leave to file a response to AT&T's reply comments in the Bahamas and the Netherlands proceedings IS GRANTED.

45. IT IS FURTHER ORDERED that TLD's Application for Review, and Motion for Expedited Consideration, in File Nos. I-T-C-93-029, I-T-C-030, S-C-L-93-001 and S-C-L-93-002 ARE GRANTED to the extent noted in this Order.

[35] *See International Competitive Carrier*, 102 FCC 2d 812, 822 (1985); *International Services Order*, 7 FCC Rcd 7331 (1992).

46. IT IS FURTHER ORDERED that the Common Carrier Bureau is delegated authority to act on TLD's application File No. I-T-C-94-252 for modification of its authority to provide IMTS between Puerto Rico/U.S. Virgin Islands and the Dominican Republic.

47. IT IS FURTHER ORDERED that the regulatory requirements adopted herein are subject to modification as a result of any action the Commission may take in any relevant future proceeding of general applicability.

48. IT IS FURTHER ORDERED that this Order is effective upon release. Petitions for reconsideration under Section 1.106 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-92

In re Applications of

BOARD OF REGENTS, STATE OF FLORIDA, ACTING FOR AND ON BEHALF OF THE UNIVERSITY OF FLORIDA (hereafter "UF") — File No. BPED-930114MA

MARION COMMUNITY RADIO, INC. (hereafter "Marion") — File No. BPED-930413MA

For Construction Permit for a New Noncommercial Educational Station on Channel 215A in Crystal River, Florida

HEARING DESIGNATION ORDER

Adopted: July 26, 1994; Released: August 16, 1994

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, non-commercial, educational FM station.

2. *UF's waiver request.* UF requests a waiver of Section 73.1125 of the Commission's Rules, the "main studio rule," to permit it to operate its proposed new noncommercial FM station as a satellite of station WUFT(FM), Gainesville, Florida. UF states that the new station will make use of a dual studio-transmitter link ("STL") that will allow it to produce discrete programming for the Citrus County region. Thus, UF will be able to provide public affairs and other programming for the region that is independent of WUFT(FM) broadcasts at a time when it could not afford to build and staff a full-time studio in the region. UF also states that there has been community interest in receiving UF programming because Citrus County is unable to receive a public radio signal. UF notes that it has a proven track record of successful programming for public radio listeners and it believes that the grant of the subject application will help to reduce public "white space" in this nation. UF also states that it will provide a toll free telephone number for communication to the main studios of Gainesville.

3. UF further notes that it has had extensive recent ties with the Citrus County region and secured numerous letters and other evidence of support from the area. Moreover, it has an ongoing ascertainment process which it utilizes in connection with existing operations and this process will be brought into play in examining on a regular basis the needs and interests of the Citrus County region. UF concludes that through its existing procedures and future plans, it believes that it will be well positioned to ascertain the needs of the Citrus County region and to provide a wide range of valuable programming services to that area.

4. A "satellite" station has been defined by the Commission as one "operating on a Channel specified in the rules, but one which usually originates no local programming.... It rebroadcasts the programming of the parent station." *Multiple Ownership Rules*, 3 RR 2d 1554, 1562 (1964). In the past, the Commission has recognized the economic benefits of centralized operations for noncommercial educational stations. *See Memorandum Opinion and Order* in MM Docket 86-406, 3 FCC Rcd 5024, 5027 (1988). Because of the limited funding available to these stations, we have granted waivers to state and regional public television and radio networks to operate "satellite" stations that do not meet the main studio requirements. *See Nebraska Educational Television Commission*, 4 RR 2d 771 (1956) and *Sound of Life, Inc.*, 4 FCC 2d 8273 (1989). However, these stations have not been permitted to ignore local service obligations. *See Georgia State Board of Education*, 70 FCC 2d 948 (1979). The Commission has never "indicated, directly or indirectly, that licenses were granted to state educational networks for the purpose of providing statewide service and not local service." *Id.* at 956. Waivers generally have been granted "only upon a showing that the local community would be served ... [and] such stations will be subject to the local/toll free telephone requirements." 3 FCC Rcd at 5027. *See also* 47 C.F.R. § 73.1125(c).

5. UF has established that even without a main studio in the service area of the proposed station, it will determine local needs and respond to them in its programming. Accordingly, UF's request for waiver of 47 C.F.R. § 73.1125 will be granted.

6. *Other issues.* Section II, Item 8 of FCC Form 340 requires that an applicant specify the residence address (number, street, city, state) of its Board Members. UF has not completed item 8 correctly. UF gives either post office box or business addresses for Board Members Charles R. Edwards, Sr., J. Clint Brown, Dubose Ausley, Betty Castor, Alec P. Courtelis, Pat N. Groner, Cecil B. Keene, Jon C. Moyle, Thomas F. Petway, III, and Ross A. Wolf. Accordingly, UF must submit an amendment which gives the correct information required by Section II, Item 8 to the Presiding Administrative Law Judge after this Order is released.

7. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the UF and Marion proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, 10 RR 2d 215 (1967). Thus the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

8. Neither of the Applicants has indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency, and thus better serve the public interest. *Granfalloon Den-*

ver Educational Broadcasting, Inc., 43 Fed. Reg. 49,560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a time-sharing issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the Hearing, from participating in negotiation with a view toward establishing a share-time arrangement.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if either.

11. IT IS FURTHER ORDERED, That UF's request for waiver of Section 73.1125 of the Commission's Rules IS HEREBY GRANTED.

12. IT IS FURTHER ORDERED, That UF shall submit an amendment which contains the information required by Section II, Item 8 of FCC form 340, to the Presiding Administrative Law Judge within 30 days after the release of this order.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the day of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communication Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issue specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Linda B. Blair, Assistant Division Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-136

In the Matter of

Amendment of Section 73.202(b),	RM-8161
Table of Allotments,	RM-8309
FM Broadcast Stations.	RM-8310
(Clewiston, Fort Myers Villas,)	
Indiantown, Jupiter, Key Colony	
Beach, Key Largo, Marathon, and	
Naples, Florida)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 9, 1994; Released: August 16, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Spanish Broadcasting System of Florida, Inc. ("SBSF"), licensee of Station WZMQ(FM), Channel 280C2, Key Largo, Florida, the Commission has before it for consideration the *Notice of Proposed Rule Making and Order to Show Cause*, 8 FCC Rcd 3886 (1993), proposing the substitution of Channel 292C2 for Channel 280C2 at Key Largo, and the modification of its license to specify operation on Channel 292C2. In order to accomodate the substitution of Channel 292C2 for Channel 280C2 at Key Largo, petitioner also requested the substitution of Channel 280C2 for Channel 288C2 at Key Colony Beach, Florida, and the modification of Station WKKB(FM)'s construction permit to specify operation on Channel 280C2; and the substitution of Channel 288A for Channel 292A at Marathon, Florida, and the modification of Station WAVK(FM)'s license to specify operation on Channel 288A.

2. In response to the *Notice*, comments were filed by SBSF, Florida Keys Electric Cooperative Association, Inc. ("FKEC") and Mary Kay Reich ("Reich"). Counterproposals were filed by Key Chain, Inc. ("Key Chain") (RM-8309); Okeechobee Broadcasters, Inc. ("OBI"), Sunshine Broadcasting, Inc. ("Sunshine")[2] and Jupiter Broadcasting Corporation ("JBC") ("Joint Petitioners") (RM-8310)[3] and Naples Broadcasting Corporation ("NBC"), licensee of Station WGUF(FM), Marco, Florida.[4] In response to the counterproposals, reply comments were filed by SBSF, Sterling Communications Corp., licensee of Station WSGL(FM), Naples, Florida ("Sterling"), Vero Beach FM Radio Partnership ("Vero Beach"), SBSF and joint petitioners.[5]

3. We issued *Orders to Show Cause* ("Order"), ordering Richard L. Silva, ("Silva"), permittee of Station WKKB(FM), Channel 280C2, Key Colony Beach, Florida, and Key Chain, licensee of Station WAVK(FM), Channel 292A, Marathon, Florida, to show cause why their respective channels should not be modified. In response to the *Order*, Silva filed no response and Key Chain filed a counterproposal. Accordingly, pursuant to Section 1.87 of the Commission's Rules, Silva is deemed to have consented to the proposed exchange of channels.

4. In their counterproposal, Joint Petitioners request the substitution of Channel 276C1 for Channel 276C2 at Indiantown, Florida, and the modification of Station WOKC-FM to specify operation on Channel 276C1; substitution of Channel 292C3 for Channel 276C3 at Naples, Florida, and the modification of Station WSGL(FM)'s license to specify operation on Channel 292C3; substitution of Channel 275C2 for Channel 292A at Fort Myers Villas, Florida, and the modification of Station WSUV(FM)'s license to specify operation on Channel 275C2; substitution of Channel 258A for Channel 292A at Clewiston, Florida, and the modification of Station WAFC-FM's license to specify operation on Channel 258A; and the substitution of Channel 292C3 for Channel 258A at Jupiter, Florida, and the modification of Station WADY(FM)'s construction permit to specify operation on Channel 292C3. Three of the five affected stations are proponents of this counterproposal and Glades Media Company ("Glades"), licensee of Station WAFC-FM, Clewiston, Florida, a fourth station has provided its signed consent to the change. Joint petitioners stated their intentions to reimburse Glades for its reasonable expenses involved in changing frequencies and transmitter location. However, Joint Petitioners failed to make a reimbursement commitment in the counterproposal to Sterling Communications Corp., licensee of Station

[1] The communities of Clewiston, Fort Myers Villas, Indiantown, Jupiter and Naples have been added to the caption.

[2] On April 22, 1994, an assignment of license from Sunshine Broadcasting, Inc. to WSUV, Inc., was consummated for Station WSUV(FM), Channel 292A, Fort Myers Villas, Florida (BALH-930903GI). In addition the call sign was changed from WSUV to WROC. On June 1, 1994, an assignment of license from Okeechobee Broadcasters, Inc., to Amaturo Group, Ltd., was consummated for Station WOKC(FM), Channel 276C2, Indiantown, Florida (BALH-930907GI).

[3] Public Notice of the counterproposals was given on August 6, 1993, Report No. 1958.

[4] NBC withdrew its counterproposal on July 28, 1993, because its engineering information had been erroneously prepared. In accordance with Section 1.420(j) of the Commission's Rules, NBC states that it will not receive compensation or any other consideration for the withdrawal of its counterproposal.

[5] After the close of the comment period, Joint Petitioners filed a motion for leave to file out of cycle pleading and supplemental joint comments. SBSF filed a motion for extension of time, an opposition to motion for leave to file out of cycle pleading, and contingent opposition to supplemental joint comments and erratum. Gulf Communications Partnership ("Gulf") filed a motion for leave to file comments and comments. Joint Petitioners and WSUV, Inc. ("WSUV"), successor-in-interest to Sunshine filed a request for additional time to file comments, joint opposition to motion for leave to file comments and a joint reply to opposition. Gulf filed a response to joint petitioners opposition. WSUV filed a notice of continued interest and intent to participate. Amaturo Group, Ltd. ("Amaturo"), successor-in-interest to OBI filed a notice of continued interest and intent to participate. Commission Rule 1.415(d) precludes the filing of comments after the close of reply comment period. In addition, Joint Petitioners counterproposal is procedurally defective due to failure to state a willingness to reimburse the licensee of Station WSGL(FM), Naples Florida. *See* para. 4.

WSGL(FM), Naples, Florida, who must change channels, and is entitled to reimbursement for the reasonable costs in changing frequencies. *See Lonoke, Arkansas and Clarksdale, Mississippi*, 6 FCC Rcd 4861 (1991), *York, Alabama*, 4 FCC Rcd 6923 (1989), and *Circleville, Ohio*, 8 FCC 2d 159 (1967). Joint Petitioner's counterproposal fails to comply with the Commission's Rule that counterproposals must be technically and procedurally correct at the time of their filing. Therefore, we will dismiss their counterproposal. *See Fort Bragg, California*, 6 FCC Rcd 5817 (1991) and *Report and Order, Broken Arrow and Bixley, Oklahoma and Coffeeville, Kansas*, 3 FCC Rcd 6507 (1988), *recon. denied*, 4 FCC Rcd 6981 (1989). All comments filed in response to joint petitioner's counterproposal are moot.

5. FKEC in its comments states that a serious interference problem exists between Station WZMQ(FM), Channel 280C2, Key Largo, Florida and Station WKLG(FM), Channel 271C2, Rock Harbor, Florida, which are located at a site approximately 19 kilometers (11.8 miles) northeast of Station WCTH(FM), Channel 262C1, Plantation Key, Florida. FKEC contends that there is an intermodulation interference problem which completely blanks out the WCTH signal for a large portion of Key Largo. FKEC submits that its utilizes a subcarrier of Station WCTH for load control, and WCTH with its ERP of 100,000 watts, 500 feet tower, and central location is uniquely positioned to provide effective load control ability. FKEC states that without effective load control, its ability to furnish an uninterrupted supply of electricity to the Keys during peak loads is adversely affected. The interference to WCTH has a significant detrimental effect on its system. FKEC urges adoption of this proposal to change frequencies in order to resolve this interference problem.

6. SBSF in its comments reiterates its support for the changes proposed in the *Notice*. In response to the Commission's request for evidence of the alleged "receiver induced third order intermodulation interference ("RITOI")" to Station WCTH, Plantation Key, Florida. SBSF submitted statements from Charles Dreher, Technical Consultant to SBSF, Station WZMQ(FM) and E.W. Bie, Technical Director of Station WCTH(FM). SBSF contends that based on Mr. Dreher's statement that he conducted informal reception tests in the Key Largo area using a variety of FM receivers, confirms the existence of the intermodulation. SBSF alleges that the intermodulation occurs as a result of nonlinear mixing of signals in the FM receivers within a mile of the co-location transmitting antenna for Stations WZMQ(FM) and WKLG(FM), which causes interference to Station WCTH(FM). According to SBSF repositioning the receiver or adjusting antennas does not solve the problem. SBSF also requested Mr. Michael Nicolay, an engineer from the Carl T. Jones, Corporation to conduct some engineering tests, using a Hewlett Packard HP8568 spectrum analyzer, an HP8447D preamplifier, and an HP7475A plotter, measured the occupied bandwidth, spurious emission and harmonic output of both WKLG and WZMQ. These test confirmed the existence of RITOI. The test also determined that the interference to Station WCTH was not generated directly by either WZMQ(FM) or WKLG(FM). In test where each station separately cut its RF carrier, the spectrum analyzer showed no interference. After confirming that the outputs of both stations complied in all respects with Section 73.317 of the Rules regarding out-of-band emissions, Mr. Nicolay proceeded to further investigated the cause of the RITOI. When the carrier of only WZMQ was cut, the interference disappeared. When the carrier of WKLG was cut, the interference also disappeared. Accordingly, SBSF states that the interference to WCTH reception is strictly a matter of RITOI occasioned solely by the frequency assignments and co-location of WKLG's and WZMQ's transmitters. SBSF states that a change of frequency as proposed will eliminate the interference. Mr. Dreher also states that the Florida Keys electric power co-op, which provides electricity to all of the Florida Keys, uses WCTH's subcarrier for power load management purposes to control loads during times of peak demand to prevent brown-outs or black outs. Due to the RITOI, they cannot control receiver-equipped loads in the Key Largo area which is affected. In addition, the Florida Association of Broadcasters had originally envisioned Station WCTH as the primary station for the new emergency broadcasting system for Monroe County. However, due to the RITOI in Key Largo which prevents proper reception of WCTH's signal, another station WFKZ(FM) was designated in its place. Mr. Bie also states he has received numerous complaints from listeners, using both automobile, portable and non portable radios, that they are unable to receive WCTH's signal in the Key Largo area. He contends that the interference also disappears when either WKLG(FM) or WZMQ(FM) is off the air. Reich restates SBSF concerns.

7. In response to the *Order to Show Cause* Key Chain filed a counterproposal requesting the substitution of Channel 288C2 for Channel 292A at Marathon, Florida. Key Chain contends that the increased facilities will permit Key Chain to provide an enhanced level of service to the widely-dispersed chain of islands making up the Florida Keys. This proposal is mutually exclusive with the proposed substitution of Channel 288A for Channel 292A at Marathon, Florida. The substitution of Channel 288C2 at Marathon can be made without affecting the other changes proposed in the *Notice*. Key Chain states its intent to apply for Channel 288C2, if allotted. No other expressions of interest were received for Channel 288C2 at Marathon.

8. After consideration of the information filed in this proceeding, we believe the public interest would be served by the substitution of Channel 280C2 for Channel 288C2 at Key Colony Beach, Florida, the substitution of Channel 292C2 for Channel 280C2 at Key Largo, Florida, and the substitution of Channel 288C2 for Channel 292A at Marathon, Florida. In accordance with Section 1.420(g) of the Commission's Rules, we will modify the license of Station WZMQ(FM) at Key Largo, Florida to specify operation on Channel 292C2; we will modify the construction permit for Station WKKB(FM) at Key Colony Beach, Florida, to specify operation on Channel 280C2, and we will also modify the license for Station WAVK(FM) at Marathon, Florida, to specify operation on Channel 288C2.

9. SBSF has stated its willingness to reimburse the licensee of Station WAVK(FM), Marathon, Florida, and the permittee of Station WKKB(FM), Key Colony Beach, Florida, for the reasonable cost associated with the change in channels. However, since the licensee of Station WAVK(FM) at Marathon sought and will receive an upgrade, no reimbursement for expenses will be required for the channel change at Marathon.

TECHNICAL SUMMARY

10. Channel 288C2 can be allotted to Marathon in compliance with the minimum distance separation requirements of the Commission's Rules at the licensed site of Station WAVK(FM), at coordinates 24-43-44 and 81-02-05. Channel 280C2 can be allotted to Key Colony Beach in compliance with the minimum distance separation requirements of the Commission's Rules at the construction permit site for Station WKKB(FM), at coordinates 24-42-25 and 81-06-17. Channel 292C2 can be allotted to Key Largo in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 20.3 kilometers (12.6 miles) southwest of the community, at coordinates 24-57-20 and 80-34-50.

11. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective , 1994, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

City	Channel No.
Key Colony Beach, Florida	280C2
Key Largo, Florida	292C2
Marathon, Florida	232C2, 249A 288C2

12. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WZMQ(FM), Key Largo, Florida, IS MODIFIED, to specify operation on Channel 292C2 in lieu of Channel 280C2, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the station authorizationexcept the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules require prior authorizationpursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules. PROVIDED the transmission facilities comply in all respects with the station authorization except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

13. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WAVK(FM), Marathon, Florida, IS MODIFIED, to specify operation on Channel 288C2 in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

14. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Station WKKB(FM), Key Colony Beach, Florida, IS MODIFIED, to specify operation on Channel 280C2 in lieu of Channel 288C2, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the station authorization except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules. PROVIDED the transmission facilities comply in all respects with the station authorization except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

15. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Key Chain, Inc., licensee of Station WAVK(FM), Marathon, Florida, is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

16. IT IS FURTHER ORDERED,That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this Order to the following:

Richard L. Silva
35 Sommbrero Blvd
Marathon, FL 33050
(Permittee for
Station WKKB(FM))

Key Chain, Inc.
5500 W. W. 98th Paris
Miami, FL 33156
(Licensee for
Station WAVK(FM))

Robert J. Rini
Evan D. Carb
Rini & Coran, P. C.
1350 Connecticut Avenue,
N.W., Suite 900
Washington, D.C. 20036
(Attorneys for Joint Petitioners)

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Review of the Pioneer's Preference Rules — **ET Docket No. 93-266**

and

In the Matter of

Amendment of the Commission's Rules to Establish New Personal Communications Services — **GEN Docket No. 90-314** PP-6, PP-52, and PP-58

MEMORANDUM OPINION AND ORDER ON REMAND

Adopted: August 9, 1994; **Released: August 9, 1994**

By the Commission: Chairman Hundt not participating; Commissioner Chong not participating.

I. INTRODUCTION AND SUMMARY

1. In this order, we amend our pioneer's preference rules to require that recipients of pioneer's preferences in proceedings where tentative decisions on preference requests had been made at the time Congress enacted auction legislation must pay for their licenses. This decision applies to three proceedings -- 2 GHz personal communications services (Broadband PCS), local multipoint distribution service (LMDS) and low earth orbital satellite services in the 1.6/2.4 GHz band (so-called Big LEOs).[1] Because we have reached a decision awarding final preferences in only one of these proceedings -- broadband PCS -- that is the only proceeding for which we will determine now the appropriate amount of payment to be made. Broadband PCS pioneer's preference winners will have a choice of paying either (i) ninety percent (90%) of the winning bid for the 30 MHz license in the same market; or (ii) ninety percent (90%) of the adjusted value of the license calculated based upon the average per population price for the 30 MHz licenses in the top 10 markets as established at auction.

II. BACKGROUND

2. The pioneer's preference rules provide a means by which an applicant that demonstrates that it has developed a new communications service or technology may obtain a license to provide the new service or technology without being subject to mutually exclusive applications.[2] Under the pioneer's preference rules, an applicant may be granted a preference for a license if it demonstrates that it has developed the capabilities or possibilities of a new technology or service, or has brought the technology or service to a more advanced or effective state. The applicant for a preference must also demonstrate that the new service or technology is technically feasible by submitting either the results of an experiment or a technical showing. The preference will be granted only if the final service rules adopted by the Commission are a reasonable outgrowth of the applicant's proposal and the new technology can be used to provide the service. An applicant who meets these standards and is granted a pioneer's preference is not subject to competing applications, and if otherwise qualified will receive a license.

3. In October 1992, the Commission tentatively granted pioneer's preferences to American Personal Communications (APC) for its development and demonstration of technologies that facilitate spectrum sharing by PCS and microwave users at 2 GHz, to Cox Enterprises, Inc. (Cox) for its development and demonstration of PCS/cable plant interface technology and equipment that result in a spectrum-efficient application of PCS services, and to Omnipoint Communications, Inc. (Omnipoint) for its development of 2 GHz equipment that utilizes advanced techniques that will facilitate the continued development and implementation of PCS services and technologies.[3] In December 1993, the Commission granted final pioneer's preferences to APC, Cox, and Omnipoint.[4] The Commission determined that, if otherwise qualified, APC would be licensed to use Channel Block A in the Major Trading Area (MTA) that includes Washington, D.C. and Baltimore, Maryland (Washington-Baltimore MTA); Cox would be licensed to use Channel Block A in the MTA that includes San Diego, California (Los Angeles-San Diego MTA); and Omnipoint would be licensed to use Channel Block A in the MTA that includes northern New Jersey (New York MTA (including northern New Jersey)).[5] In granting these pioneer's preferences, the Commission directed the licensing bureau to condition any 2 GHz PCS license obtained through the pioneer's preference process upon the licensee's building a system that substantially uses the design and technologies upon which the preference award was based;[6] and upon the licensee's holding the license for a minimum of three years or until the construction requirements ap-

[1] While we name the three current recipients of broadband PCS preferences for ease of reference, we emphasize that by doing so in no way do we intend to indicate prejudgment of the petitions for reconsideration of our broadband PCS pioneer's preference decision. The payment rule we adopt here will apply to the three proceedings in which a tentative (but not final) decision regarding preferences had been made as of August 10, 1993 in the three proceedings.

[2] The pioneer's preference rules are codified at 47 C.F.R. §§ 1.402, 1.403, 5.207 (1993).

[3] Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794, 7797-7804 (1992).

[4] Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Third Report and Order, 9 FCC Rcd 1337, paras. 10-36 (APC), paras. 37-50 (Cox); and paras. 51-74 (Omnipoint) (1994) (*"Broadband Report and Order"), recon. pending; petitions for review filed, Pacific Bell v. FCC*, D.C. Circuit Nos. 94-1148 *et al., remanded on the Commission's own motion*, July 26, 1994.

[5] *Broadband Report and Order*, 9 FCC Rcd at 1349, para. 80.

[6] This condition applies only in the service area for which the preference is granted and only for the initial required five-year build-out period specified in the broadband PCS rules. *Broadband Report and Order*, 9 FCC Rcd at 1339, para. 8.

plicable to the five-year build-out period have been satisfied, whichever occurs first.[7] In December 1992, the Commission also awarded a tentative preference to Suite 12 Group in the LMDS service.[8] In August 1992, the Commission tentatively denied all requests for preferences in the Big LEO service.[9]

4. After these tentative decisions, Congress gave the Commission authority to award licenses by auction.[10] The Commission then issued a Notice of Proposed Rule Making in ET Docket No. 93-266 to evaluate whether it should change the pioneer's preference rules in light of this landmark change in its statutory authority. The Commission was concerned that the competitive bidding authority may have undermined the basis for the pioneer's preference rules:

> Establishment of competitive bidding authority creates a new dynamic for the assignment of licenses. Specifically, a bidder, who may also happen to be an innovator, through its bidding efforts would primarily control whether it obtains the desired license. It may obtain the license directly by outbidding other mutually exclusive applicants, whether by using its own financial resources or by soliciting the aid of financial institutions and venture capitalists. One may conclude, therefore, that under this new scheme the value of innovation may be considered in the marketplace and measured by the ability to raise the funds necessary to obtain the desired license(s). Thus, we are concerned that competitive bidding authority may have undermined the basis for our pioneer's preference rules.[11]

The Commission asked for comment on how any changes in the pioneer's preference rules as a result of auction authority should apply to the three proceedings in which tentative preference decisions had been issued.

5. Several commenters argued that, at the very least, preference recipients in these proceedings should be required to pay for their licenses. Specifically, for example, Pacific Bell and Nevada Bell argued that an "outright grant of a license would confer a significant cost advantage in a highly competitive market over firms which will be required to expend financial resources to successfully bid in auctions to acquire spectrum."[12] Nextel argued that, to prevent anticompetitive inequities in the cost of obtaining Commission licenses, the preference winners should have to pay for their licenses.[13] PageMart, Inc. argued that the pioneer's preferences were designed to provide "regulatory certainty for an innovator; they were not intended to result in a financial windfall."[14] PageMart further argued that non-pioneer licensees would be handicapped (without any public benefit) if they had to take on a substantial financial burden that was not imposed on preference grantees.[15] Southwestern Bell argued that "allowing the pioneers to be licensed without making a similar investment [as those who bid] not only would subvert the intentions of Congress in setting up the auction process, it would also grossly distort the competitive dynamics of the new market the Commission is creating."[16] NYNEX argued that requiring all licenses (including pioneer's licenses) to be competitively awarded would promote economic efficiency by allowing the competitive market to determine the value of the pioneer's innovation.[17] Other commenters including APC, Cox, and Omnipoint argued that any such charge would be inequitable.[18] In the *Pioneer's Preference Review Report and Order*, while not reaching the overall question of what changes, if any, should be made in its preference rules, the Commission decided that it would be "inequitable" to apply any such rule changes to the three proceedings at issue here.[19] Its explanation, in full, for this decision was as follows:

> We conclude that it would be inequitable to apply any changes in our rules to pending proceedings in which Tentative Decisions have been issued. Notwith-

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[7] *Id.* at para. 9. This is consistent with the conditions that the Commission directed the licensing bureau to place upon the license granted to the narrowband PCS (900 Mhz) pioneer's preference recipient. *See* Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, GEN Docket No. 90-314 and ET Docket No. 92-100, Memorandum Opinion and Order, 9 FCC Rcd 1309, 1316, paras. 47-48 (1994) (*Narrowband Reconsideration*), *recon. pending* (unrelated to pioneer's preference).

[8] Establishment of Local Multipoint Distribution Service, CC Docket No. 92-297, Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration, 8 FCC Rcd 557 (1993).

[9] Amendment of Section 2.106 of the Commission's Rules to Allocate the 1610-1626.5 MHz and 2483.5-2500 MHz Bands for Use by the Mobile-Satellite Service, Including Non-Geostationary Satellites, ET Docket No. 92-28, Notice of Proposed Rule Making and Tentative Decision, 7 FCC Rcd 6414 (1992).

[10] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title IV, § 6002, 107 Stat. 387 (enacted Aug. 10, 1993).

[11] Review of the Pioneer's Preference Rules, ET Docket No. 93-266, Notice of Proposed Rulemaking, 8 FCC Rcd 7692, 7693, para. 7 (1993) (*"Pioneer's Preference Review NPRM"*).

[12] Comments of Pacific Bell and Nevada Bell at 2 (filed Nov. 15, 1993).

[13] Comments of Nextel Communications, Inc. at 9 (filed Nov. 15, 1993).

[14] Comments of PageMart, Inc. at 6 (filed Nov. 15, 1993).

[15] *Id.*

[16] Initial Comments of Southwestern Bell Corporation at Appendix A, p.2 (filed Nov. 15, 1993).

[17] Comments of the NYNEX Corporation at 3 (filed Nov. 15, 1993). NYNEX also suggested that the winning pioneer should receive a discount or some other special financial arrangement. *Id.*

[18] *See, e.g.*, Comments of Cox Enterprises, Inc. at 12-13 (filed Nov. 15, 1993); Comments of Omnipoint Communications, Inc. at 24-28 (filed Nov. 15, 1993). *See also* Comments of Suite 12 Group at 15-16 (filed Nov. 15, 1993) ("... if the Commission decides to eliminate or alter significantly the pioneer's preference rules in this proceeding, equity demands that the tentative grants made in several proceedings, including the granth) to Suite 12 in the LMDS proceeding, be grandfathered from any such changes in the rules."); Comments of CELSAT, Inc. at 5 (filed Nov. 15, 1993) ("... any modifications of the Commission's rules now to eliminate or limit the benefits of a pioneer's preference for otherwise deserving applicants would be manifestly unfair.")

[19] Review of the Pioneer's Preference Rules, ET Docket No. 93-266, First Report and Order, 9 FCC Rcd 605, 610-11 (1994) (*"Pioneer's Preference Review Report and Order"*).

> standing that other licensees in the three proceedings at issue may have to pay for their licenses, preference applicants in these proceedings have submitted their requests and publicly disclosed substantial detail of their system designs in reliance on the continued applicability of the pioneer's preference rules. We have evaluated their requests based on existing rules and issued Tentative Decisions, and parties have expended not inconsiderable resources to further argue the merits or demerits of the requests and our tentative conclusions addressing the requests. Had the rules been different, these applicants might have structured their requests differently; or conducted research, development, and experimentation differently; or elected not to disclose detailed information about their systems. We conclude that notwithstanding our legal authority to treat 2 GHz broadband PCS pending applicants differently than the 900 MHz narrowband PCS pioneer (Mtel) and also to apply changed rules prospectively to pending applicants in the 28 GHz LMDS and 1.6/2.4 GHz MSS proceedings, to do so would be inequitable in these three proceedings.[20]

As a result of that decision, APC, Cox, and Omnipoint (as well as any preference winners in the LMDS and Big LEOs/MSS proceedings) would not be required to pay for their licenses.

6. Subsequent to the decisions awarding final pioneer's preferences to APC, Cox, and Omnipoint and requiring no payment for the pioneer's licenses, a number of applicants whosebroadband PCS pioneer's preference requests had been denied petitioned for judicial review raising a number of challenges to the awards.[21] A primary argument of the petitioners to the court was that the Commission had not adequately explained its decision to retain the pioneer's preference program and to award the broadband PCS preference licenses for free. The petitioners asked the court to vacate the *Broadband Report and Order* and the *Pioneer's Preference Review Report and Order*. On July 8, 1994, the Commission's General Counsel, on instruction by the Commission, filed a motion in the District of Columbia Circuit asking the court to remand the broadband PCS cases to the Commission for further consideration.[22] The Commission stated that it intended "to reconsider the substance of the decision not to charge these pioneer's preference winners for licenses in circumstances where other licensees in the same service would pay substantial amounts in order to prevail in competitive bidding procedures," and that it would issue a decision within two weeks of any remand.[23]

7. By order dated July 26, 1994, the court granted the Commission's motion and remanded the cases for further consideration.[24] Due to our commitment to the court to act expeditiously on such further consideration, we are not addressing here petitions for reconsideration of the *Broadband Report and Order* or the *Pioneer's Preference Review Report and Order*.[25]

III. DISCUSSION

A. Payment Requirement

8. Arguments that APC, Cox, and Omnipoint (as well as any preference recipients in LMDS and Big LEOs) should pay for their licenses were considered in the *Pioneer's Preference Review Report and Order*.[26] In that order we decided, as a matter of equity, not to charge APC, Cox, and Omnipoint for the licenses that they may receive pursuant to their pioneer's preference awards.[27] The Commission noted that APC, Cox, and Omnipoint had publicly disclosed substantial details of their system designs in reliance on the continued applicability of the rules and had expended resources to argue the "merits or demerits of the requests and our tentative conclusions addressing the requests."[28] In this order, we revisit the question of payment for the licenses.

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[20] *Pioneer's Preference Review Report and Order*, 9 FCC Rcd 605, 610-11 at para. 9 (footnotes omitted).

[21] *See Pacific Bell v. FCC*, D.C. Circuit Nos. 94-1148, *et al.*

[22] Commission Instructs General Counsel to Seek Remand of Broadband Personal Communications Service Pioneer's Preference Cases, FCC 94-182, Public Notice (released Jul. 8, 1994) (*"July 8 Public Notice"*).

[23] *Id.*

[24] On July 26, 1994, APC filed "Supplemental Comments on Remand" (*"APC Remand Comments"*). A "Joint Response of Pacific Bell and Bell Atlantic Personal Communications to American Personal Communications' Post-Remand Filing" (*"Joint Response"*) was filed on August 1, 1994. The *Joint Response* addressed the *APC Remand Comments* and two other filings made by APC: "Emergency Request for Oral Argument" (filed July 21, 1994) (*"APC Emergency Request"*) and "Further Comments on Spectrum Blocks for Competitive Bidding and Scope of Preference Awards" (filed June 22, 1994) (*"APC Further Comments"*). *Joint Response* at 1.

[25] We deny the Emergency Request for Oral Argument filed by APC. We note that oral argument would not be useful in this instance since the parties have had ample opportunity to brief the issues considered here, and APC itself filed supplemental comments on remand after filing its emergency request. We would not be able to schedule or and hold oral argument in any event within the deadline for action specified in our request for remand.

[26] While our discussion here focuses on broadband PCS because that is the proceeding on which the parties focused and the only one of the three at issue that has progressed to final award of pioneer's preferences, our discussion applies to the LMDS and Big LEO proceedings as well, unless otherwise indicated.

[27] *Pioneer's Preference Review Report and Order*, 9 FCC Rcd at 610, para. 9. We previously had decided that we would not require the narrowband PCS pioneer's preference grantee, Mtel, to pay for a license awarded on the basis of its pioneer's preference grant. *See* Review of the Pioneer's Preference Rules, ET Docket No. 93-266, Notice of Proposed Rule Making, 8 FCC Rcd 7692, 7694-95, para. 18; *Narrowband Reconsideration*, 9 FCC Rcd at 1316, para. 45. Subsequently, on consideration of Mtel's application for a license, the Commission determined that "[it] cannot reach the conclusion that a grant to Mtel would serve the public interest, convenience, and necessity without requiring that Mtel pay for its license." *See* Nationwide Wireless Network Corp., FCC 94-187, Memorandum Opinion and Order at para. 19 (released July 13, 1994) (*Mtel Order*). Accordingly, the Commission conditioned Mtel's grant on a payment requirement.

[28] *Pioneer's Preference Review Report and Order*, 9 FCC Rcd at 610, para. 9.

9. At the outset, we note that, since the adoption of the *Pioneer's Preference Review Report and Order* and the *Broadband Report and Order* in December 1993, we have adopted four reports and orders in the Competitive Bidding proceeding setting forth general auction rules and specific auction rules for narrowband PCS, interactive video and data services (IVDS), and broadband PCS.[29] This has led to a greater understanding on our part of how the competitive bidding process will work in the context of the award of spectrum for various services and, in particular, broadband PCS. It has also resulted in concern over the award of free licenses to some parties when other licensees competing in the same markets must bid and pay substantial amounts of money for their licenses. In particular, we are concerned that the award of free licenses to APC, Cox, and Omnipoint would result in unjust enrichment of the parties and give them a financial advantage over licensees who may pay significant sums for their licenses. We also are concerned about the effect that granting free licenses to these applicants might have on the auction process.

10. In adopting the pioneer's preference procedures, the Commission sought to foster the development of new services and to improve existing services by reducing the delays and risks for innovators associated with the Commission's allocation and licensing processes as they existed then.[30] In particular, the Commission was concerned that an innovator facing a lottery had no assurance of receiving a license and therefore no confidence in its ability to obtain a license as a reward for its efforts.[31] We decided to offer a significant reward to encourage innovators to present proposals for new technologies and services to the Commission in a timely manner. In crafting this "reward," our intention was to assure innovators that they would be able to obtain licenses so as to implement their innovations. We did not contemplate rewarding an innovator by giving it a license for free while its competitors had to pay, because at that time no one paid for initial licenses. Rather, we decided to permit an otherwise qualified pioneer's preference recipient to apply for a license without facing competing applications:[32]

> Our objective in establishing a pioneer's preference is to reduce the risk and uncertainty innovating parties face in our existing rule making and licensing procedures, and therefore to encourage the development of new services and new technologies. The essence of this risk and uncertainty is that they may not be awarded a license and, therefore, may not be able to take their developmental work into full business operation. **The most workable action we can take to reduce this risk is effectively to guarantee an otherwise qualified innovating party that it will be able to operate in the new service by precluding competing applications.**[33]

11. The Commission concluded that it has the authority to grant a dispositive preference as a reward for innovation.[34] The text of the Commission's decisions make clear that the overriding objective of the pioneer's preference rules was to ensure the award of a license to an otherwise-qualified pioneer's preference recipient. Nowhere did the Commission suggest that it wished to give the preference recipient a financial or competitive advantage over other licensees.[35] Indeed, in rejecting proposals to give preference recipients a formal headstart over other licensees, the Commission explicitly rejected that goal.[36] We have recognized from the outset that pioneer's preference recipients may receive a *de facto* headstart because of the nature of our licensing process, but we specifically declined to provide a headstart beyond any such *de facto* headstart.[37] In light of this background, the arguments of the petitioners to the court, and our further understanding of the auction process, we now conclude that our pioneer's preference rules should be amended to require preference recipients in those proceedings where tentative decision had been reached at the time of the auction statute's enactment to pay for licenses.

12. We do not decide in this order whether the pioneer's preference policy remains useful, and choose not to do so in this order, which involves pioneer's preference awards in proceedings where tentative decisions were made prior to the legislation granting authority to conduct auctions. We do reconsider how the pioneer's preference policy

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[29] Implementation of Section 309(j) of the Communications Act, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348 (1994) (*"Competitive Bidding Second Report and Order") (general auction rules);* Implementation of Section 309(j) of the Communications Act, PP Docket No. 93-253, Third Report and Order, 9 FCC Rcd 2941 (1994) (*narrowband PCS auction rules);* Implementation of Section 309(j) of the Communications Act, PP Docket No. 93-253, Fourth Report and Order, 9 FCC Rcd 2330 (1994) (*IVDS auctions rules);* and Implementation of Section 309(j) of the Communications Act, PP Docket No. 93-253, Fifth Report and Order, FCC 94-178 (released July 15, 1994) (*"Competitive Bidding Fifth Report and Order") (broadband PCS auction rules).*

[30] *Pioneer's Preference Report and Order*, 6 FCC Rcd at 3488, para. 1.

[31] *Pioneer's Preference Review NPRM*, 8 FCC Rcd 7692, paras. 1 and 5.

[32] *Pioneer's Preference Report and Order*, 6 FCC Rcd at 3490, para. 19.

[33] 6 FCC Rcd at 3492, para. 32 (emphasis supplied).

[34] 6 FCC Rcd at 3492, para. 33. Upon reconsideration, the Commission affirmed that the preference will be dispositive. 7 FCC Rcd 1808, 1809 at para. 8. On further reconsideration, the Commission discussed at length its legal authority to award a dispositive preference. *See* 8 FCC Rcd 1659 (1993).

[35] *See* discussion at para. 1919, *infra*.

[36] *Pioneer's Preference Report and Order*, 6 FCC Rcd at 3492, para. 34:

> We further have decided not to provide a headstart for the pioneering entity beyond the *de facto* headstart that may occur due to the time it may take other entities to apply for and receive a license. The commenting parties have convinced us that no additional headstart is necessary. As Southwestern Bell points out, the main effect of a headstart would be to give the pioneer a temporary service monopoly. As Southwestern Bell, Geller and Lampert, and others note, the key public interest benefit of a preference is the assurance to the pioneering entity that, if otherwise qualified, it will receive a license. For the Commission to go beyond this and guarantee the pioneer a temporary service monopoly would not appear to be justified at this time. [footnote omitted.

[37] *Pioneer's Preference Report and Order*, 6 FCC Rcd at 3492, para. 34.

should be implemented in the auction environment with respect to proceedings where tentative preference decisions were made before Section 309(j) was enacted. This decision thus addresses only the transitional question of appropriate changes in our pioneer's preference rules for those three proceedings where tentative decisions already had been adopted when auctions were authorized.

13. At the time the pioneer's preference rules were adopted, all licenses were awarded at the same price -- for free. We see no sound public interest reason to award some licenses for free when other licensees who will compete in the same markets will have to pay for them. Pioneers were never promised a free license, or even a discount or a bonus, but instead were assured that they would be able to obtain a license if they developed valuable technological innovations. Moreover, we fail to advance Congress's objective, set out in Section 309(j)(3)(C) of the Act, of "avoidance of unjust enrichment" if we award pioneer's preference licenses to these applicants for free.[38] We recognize that Congress has instructed us not to seek to maximize auction revenues at the cost of other important objectives. Nonetheless, we do not interpret that admonition to require us to award pioneer's preference licenses for free if that would serve no valid public interest purpose and in fact would disserve other important objectives. Accordingly, we conclude that the proper application of the pioneer's preference policy in the auction environment where tentative decisions were made prior to the auction statute is to guarantee that the pioneers receive licenses, but on roughly the same terms as other licensees. That is no less than the pioneers were promised when the pioneer's preference policy was adopted.

14. Our decision here is buttressed by our concerns about introducing financial inequalities into the broadband PCS market. We recognize, as APC's economic experts argue, that profit-maximizing firms in a competitive market will not base their pricing and output decisions on "sunk costs," but on marginal or incremental costs.[39] We nevertheless believe it self-evident that awarding licenses for free to some parties while requiring others to pay substantial sums is likely to provide the pioneers with a financial advantage over their competitors. We do not seek to equalize the financial status of competitors or to handicap those that obtain advantages by virtue of their other activities or holdings. Here we see no legitimate basis for *creating* financial advantages for some parties over their competitors. We would not charge pioneer's preference winners for their licenses simply to enhance the government's revenues or to ensure that pioneer's preference recipients do not have lower debt payments than their competitors, if there were a good public interest reason to award licenses to pioneers without requiring payment. But based on the record here, and in light of our experience with auctions, we conclude that our public interest mandate requires that pioneers not obtain licenses free of charge while their competitors must purchase licenses at auction. Providing licenses to preference winners for free would give a financial advantage to some competitors with no public interest benefit. We believe such action would disserve important public policy objectives.

15. As the *Joint Response* points out, moreover, the auction process itself was designed in large part to promote competition by assigning spectrum to users that are most likely to offer new, better, and lower cost services.[40] Congress enacted our statutory auction authority in large measure based upon the theory that awarding licenses to those who value them most will encourage growth and competition in the development of new services. Granting some licenses free necessarily would undermine this purpose to the extent that the recipients of free licenses might not have valued them as much as the other bidders. Our decision to require a payment tied to the actual auction results permits the competitive bidding process to identify -- as it was intended to do -- those applicants who value the licenses most and thus can be expected to compete vigorously in the development of new services. If the pioneers are unwilling to pay even the discounted charges we order, the licenses will be awarded to those who value them most highly.

16. On further reflection, we are convinced that the equities, considered more broadly, favor a policy requiring payment. In making equitable determinations, we must balance the interests of all affected parties and of the public.[41] The public would not be favored by free grants, which might frustrate, at least in part, the Commission's efforts to recover for the public a part of the value of the spectrum the pioneers will use.[42] Our decision here avoids the "unjust enrichment" that free licenses would provide in the new auction environment that did not exist when these parties applied for preferences.[43] Charging them for their licenses thus is "equitable" to the pioneers as well. We conclude on further review of this issue that requiring payment is an equitable decision as well as a sound legal and policy decision.

17. We recognize that preference recipients have argued that the public interest would be served by granting them free licenses as a reward for investments and disclosure of information they have made in reliance on their expectation of a preference.[44] There is, however, no evidence in the record to suggest that such investment and information disclosure would not have been made if the preference recipients had known they would have to pay for a guaranteed license. We believe it is reasonable to conclude that, to the extent this investment and disclosure related to Commission rules at all, it related to the expectation of a guaranteed license, not a guaranteed license without payment where other competitors must pay for their licenses.

18. Our decision to require payment also is driven by concern for a rational and fair auction process. The Commission has issued a number of orders relating to auctions since we decided initially that the pioneers in these three proceedings would not have to pay for their licenses, and

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[38] *See Joint Response* at 12-15. We recognize this purpose relates specifically only to auction winners. Nevertheless, given the close relationship of our decision here to the auction process, we believe it is appropriate to take this purpose into account here.

[39] *See APC Remand Comments*, at 1-6 and Joint Affidavit of John P. Gould and Gustavo E. Bamberger.

[40] *See Joint Response* at 6.

[41] *E.g., McElroy Elec. Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993) (Commission must balance "all relevant interests").

[42] *See* 47 U.S.C. § 309(j)(3)(C).

[43] *Id.*

[44] *See* Comments of American Personal Communications (filed Nov. 15, 1993) at pp. 8-11, 15-16.

our understanding of the auction process has grown as we have resolved various issues relating to the auctions. For example, in the *Competitive Bidding Second Report and Order*, we concluded that, where the licenses to be auctioned are interdependent and their value is expected to be high, simultaneous multiple round auctions would best achieve our goals for competitive bidding and would award interdependent licenses to the bidders who value them the most.[45] In addition, we concluded that highly interdependent licenses should be grouped together and put up for bid at the same time in multiple round auctions.[46] We later expressed our belief that the values of most broadband PCS licenses will be significantly interdependent.[47] In addition, while we believe that all broadband PCS licenses are interdependent, we decided not to auction them all simultaneously due to the cost and complexity of auctioning a very large number of interdependent licenses simultaneously.[48] Instead, we decided to "divide the licenses into three groups by combining those licenses that are most closely related so that there will be limited interdependence across groups."[49] We determined to auction the 99 available 30 MHz MTA licenses in Blocks A and B in the first auction.[50] We now have a clearer understanding of the interdependence of the broadband PCS MTA licenses and the significant impact that the free award of some of those licenses might have on the rationality and fairness of the auction process. In light of this interdependence, the degree to which a free license could result in uneconomic allocation of the spectrum is increased. Indeed, the entire bidding process might be distorted by awarding a pioneer's preference recipient a license without payment requirements.[51]

19. In sum, based on our re-evaluation of the record, and our own understanding of the relevant issues, we conclude that pioneer's preference recipients in proceedings where tentative decisions had been reached at the time of the auction statute's enactment should be required to pay for their licenses.[52] The amount of payment will be determined in the context of each proceeding. We amend our pioneer's preference rules accordingly.[53]

B. Amount of Payment in Broadband PCS

20. In our recent narrowband PCS decision awarding a license to a pioneer, we required the recipient, Mtel, to pay either ninety percent (90%) of the lowest winning bid for a comparable license or $3 million less than the lowest winning bid, whichever is less. We decided not to require Mtel to pay the full value of the license, as determined at the auction, because we had imposed more stringent build-out requirements on Mtel than on other narrowband PCS licensees and because we had disrupted Mtel's business plans by deciding to charge for the license after earlier deciding that Mtel would not have to pay. The first of those circumstances is not applicable here because we have imposed no additional build-out requirement on pioneers receiving broadband PCS licenses. On the other hand, we did conclude previously that APC, Cox, and Omnipoint would receive their licenses without charge. And we have decided to condition the broadband PCS grants on the licensees holding their licenses for a minimum of three years or until the five-year construction requirements have been satisfied.

21. In spite of the differences, we have decided to adhere to a similar formula in this case that we applied to Mtel, which also involved a party that had been tentatively awarded pioneer's preference before we were granted authority to auction licenses. We believe the formula set forth below should adequately compensate APC, Cox, and Omnipoint for any transaction costs incurred in reliance on our prior determination that they would receive their licenses for free, particularly since that determination remained subject to challenge in court. At the same time, we are not concerned that a discount of that amount will provide these pioneers with an excessive financial advantage over their competitors, since the discount will amount to a small fraction of the cost of the license, which in turn is only one part of the cost of building a system. Nor do we believe that this discount will affect the auction process adversely.[54]

22. The *Joint Response* argues that the Commission can choose one of two ways to implement the payment requirement: (i) require the pioneer's preference recipients to participate in the auction, but give them a discount; or (ii) withhold the licenses from the auction but condition their award on payment of a sum discounted from auction

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[45] 9 FCC Rcd at 2367, paras. 109-111.

[46] 9 FCC Rcd at 2366, paras. 106-107.

[47] *Competitive Bidding Fifth Report and Order* at para. 31:

> We further believe that the values of most broadband PCS licenses will be significantly interdependent because of the desirability of aggregation across spectrum blocks and geographic regions and because there is a high degree of substitutability among licenses with the same amount of spectrum and covering the same geographic region.

[48] *Competitive Bidding Fifth Report and Order* at para. 36.

[49] *Id.*

[50] *Id.* at para. 37. The 986 Basic Trading Area (BTA) licenses in Blocks C (30 MHz) and F (10 MHz) will be put up for bid in the second broadband PCS auction. The 986 10 MHz BTA licenses in Blocks D and E will be put up for bid in the last auction. *Id.*

[51] *See* discussion at para. 1615, *supra*.

[52] The Commission has undertaken a negotiated rulemaking procedure in an attempt to adopt rules for Big LEOs that will avoid mutual exclusivity. Our decision regarding payment for any Big LEO preference awards would only be relevant if mutually exclusive applications can not be avoided and an auction becomes necessary.

[53] We note that Congressman Dingell recently introduced legislation that would amend Section 309(j)(6)(G) of the Communications Act, 47 U.S.C. § 309(j)(6)(G), to require that the Commission charge a pioneer's preference recipient 90% of the highest bid for a comparable license. *See* H.R. 4700, 103d Cong., 2d Sess. (1994) ("Pioneer Preference Reform Act of 1994"). We recognize that this pending bill is not law and emphasize that our judgment on these issues is based on our own analysis and experience.

[54] We note that the narrowband PCS auctions, which took place after we decided to require Mtel to pay a discounted amount for its license, produced total winning bids of $617,006,674. *See* Announcing the High Bidders in the Auction of Ten Nationwide Narrowband PCS Licenses, Public Notice, Mimeo No. 44177 (Aug. 2, 1993). This amount was significantly more than expected by some observers of the licensing process.

prices as was done with Mtel.[55] The parties filing the *Joint Response* favor the former method. For this transition period, we will withhold the licenses from the auction, but require a discounted payment. This result is closer to the original intent of the pioneer's preference programs's guarantee of a license. A bidding credit, in contrast, would put the pioneer at risk that it might not receive a license. We reserve the right, for pioneer's preference awards made entirely in the post-auction environment, to revisit this issue in the ongoing Pioneer's Preference Review proceeding.

23. We note that a variety of mechanisms for determining the pioneer's payment have been proposed to the Commission. APC argues that, if there is to be a payment, a 25% discount below the national average price of licenses for broadband PCS MTA licenses is appropriate because the auction price of the second license in the pioneer's MTA is likely to be higher in a market 7where it is the only 30 MHz license available.[56] Basing payment on a "national average" would result in significantly undervaluing the licenses at issue here. As the *Joint Response* points out, the three broadband PCS licenses involved here are all for major markets. We note that the preference holders in broadband PCS would receive licenses for three of the most populous MTAs. The New York MTA is ranked No. 1; the Los Angeles-San Diego MTA is ranked No. 2; and the Washington-Baltimore MTA is ranked No. 10 in the Rand McNally *1992 Commercial Atlas & Marketing Guide*. The auction prices paid for licenses in much smaller markets should not be averaged in with the prices paid in those large markets to determine what the pioneers should pay. At the same time, we recognize that using the other comparable MTA licenses (*i.e.*, the other 30 MHz license in each region) in the market may not be the most appropriate measure. Unlike the situation with narrowband PCS, where several other comparable licenses in the nationwide market existed as a basis for calculating the payment amount for the preference winner, the use of what is now only one other comparable license in the market might lead to a somewhat distorted result. To address this problem, broadband PCS pioneer's preference winners will have a choice of payment methods. They may pay either ninety percent (90%) of the winning bid for the other 30 MHz license in the MTA or ninety percent (90%) of the adjusted value of the license which is calculated based on the average per population price for the 30 MHz licenses in the top 10 MTAs as established at the auction.[57] This latter amount would be calculated by adding together the winning bids for the other 30 MHz MTA licenses for the top 10 markets offered at auction[58] and dividing by the total population covered by those licenses.[59] This would establish an average per population (per pop) price for the top 10 MTAs. The preference recipient would then multiply the average per pop price by the population of its MTA :to establish the pre-discount value of its license. The preference recipient would be required to pay ninety percent (90%) of that amount. Taking into account all of the top 10 markets in the latter payment method will help avoid any such distortion without the problem of including substantially smaller markets which would itself distort the result. We will not include the $3 million dollar option that we had in the narrowband context. We believe that the options here will cover the costs discussed in para. 2121, *supra*.

24. One party has proposed, as an option to a price based on auction results, that pioneers pay a royalty of 3%-5% on gross revenues over 10 years as the appropriate payment mechanism.[60] First, we find that this payment method is too speculative because the amount of the payment can not be determined until years after the fact. Second, this method may result in a payment amount that is not commensurate with the present market value of the license itself because it is based on a different measure. It also fundamentally departs from the auction concept because it is based upon after-the-fact results rather than forecasts of revenues which other potential licensees must develop and rely on in determining the amount they are willing to bid for their license. We conclude that the payment options imposed here strike the correct balance between the avoidance of unjust enrichment on the part of some broadband PCS licensees and the transition to auctions to award broadband PCS licenses.

25. Any broadband PCS licenses awarded to pioneer's preference recipients will be conditioned upon their making the required payments. Their payments must be received no later than thirty (30) days after the orders granting their licenses and their pioneer's preferences have become final, as well as the decision here to require payment, that is, 30 days after the orders are no longer subject to administrative reconsideration or judicial review.

C. Authority to Require Payment

26. Our decision requires us to determine whether we have authority to amend our pioneer's preference rules to require pioneer's preference recipients to pay for their licenses. The question of our authority to require payment from pioneers was raised in the rulemaking notice that began our *Review of Pioneer's Preference Rules*:[61] but we did not resolve the question in that proceeding because we decided at that time not to require payment by narrowband or broadband PCS preference recipients.[62] Now that we

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[55] *Joint Response* at 15-16.

[56] *See APC Emergency Request* at 11-12, *APC Further Comments* at 3.

[57] Should the spectrum or market size of the pioneer's preference recipients' tentative awards be changed due to the pending reconsideration of these awards, the payment would be based on the then comparable license.

[58] A total of twenty 30 MHz MTA licenses in the top 10 markets are available in Blocks A and B for broadband PCS - two per each market. *See* 47 C.F.R. § 24.202 (Service Areas) and 47 C.F.R. § 24.229 (Frequencies).

[59] Population should be calculated based on the 1990 U.S. census figures as published in the Rand McNally *1992 Commercial Atlas & Marketing Guide*. Total population means the population covered by each of the other MTA licenses, *e.g.*, the population of the Chicago MTA (Market No. 3) would be included twice because two licenses for that MTA will be auctioned.

[60] *See* Ex Parte Letter from Douglas G. Smith, President, Omnipoint Corporation to William F. Caton, Acting Secretary, FCC (July 5, 1994).

[61] *Pioneer's Preference Review NPRM*, 8 FCC Rcd 7692, 7693, para. 10.

[62] *Id.* at 7694-5, para. 18. *Pioneer's Preference Review Report and Order*, 9 FCC Rcd at 610, para. 9. We did, however, conclude that any such rule change would not constitute retroactive rulemaking. *Id.*, 9 FCC Rcd at 610-11, n.24.

have decided to require payment by the preference winners in these proceeding, we must consider our authority to do so. Our analysis in this case is similar to that in our order granting Mtel's narrowband PCS license subject to a payment condition.[63]

27. Section 309(j) of the Communications Act,[64] the source of our authority to select licensees by auction, applies only when the Commission has accepted "mutually exclusive applications" for licenses or construction permits. APC, Cox, and Omnipoint, by operation of our pioneer's preference rules, are the only entities eligible to apply for the licenses at issue, and there can be no mutually exclusive applications for those licenses.[65] Thus, we could not require APC, Cox, and Omnipoint to bid in an auction under Section 309(j) unless we amended our pioneer's preference rules to change the nature of the pioneer's preference award,[66] which we do not do here.

28. Some parties at various stages of these proceedings have contended that Section 309(j) is the only source of authority for the Commission to assess a charge (other than a generally applicable fee) for a license, and that we have no choice but to grant APC, Cox, and Omnipoint's licenses without requiring payment.[67] We disagree, and for the reasons that follow, we find such authority under Section 4(i),[68] in conjunction with Sections 1, 303(r), 307, 309, and 214,[69] of the CommunicationsAct.

29. Section 4(i), which has been called the "necessary and proper clause" of the Communications Act,[70] authorizes the Commission to

> perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

We could not rely upon Section 4(i) to contravene an express prohibition or requirement of the Act, as the language of Section 4(i) itself makes clear. Thus, if any provision of the Act prohibited the Commission from imposing a charge on a pioneer's preference recipient, Section 4(i) would not be an independent basis for such authority. But no provision of the Act addresses this issue, either expressly or implicitly. Therefore, requiring preference recipients to pay for their licenses is "not inconsistent with the Act."[71]

30. The remaining inquiry under Section 4(i) is whether the action the Commission proposes to take "may be necessary in the execution of its functions." In application, Section 4(i) has been held to justify FCC orders that were not within explicit grants of authority, where the orders reasonably could be found to be "necessary and proper" for the execution of the agency's enumerated powers. In *Nader v. FCC*,[72] for example, the court held that an FCC order prescribing a rate of return for AT&T "was in the public interest, necessary for the Commission to carry out its functions in an expeditious manner, and within its section 4(i) authority."[73] This was so even though the Communications Act gave the Commission express authority, in Section 205(a),[74] to prescribe "any charge, classification, regulation, or practice of any carrier...." but did not mention any authority to prescribe a rate of return. Similarly, in *Lincoln Telephone & Telegraph Co. v. FCC*,[75] the court affirmed an order of the Commission requiring the telephone company, which was a "connecting carrier" within the meaning of the Act, to file tariffs with the FCC offering certain services. The order was upheld even though the only provision in the Act requiring carriers to file tariffs, Section 203(a),[76] specifically exempted connecting carriers from that requirement. The court held:

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[63] *See Mtel Order, supra*, note 1427.

[64] 47 U.S.C. § 309(j).

[65] We reiterate that while we name the three current recipients of broadband PCS preferences for ease of reference, we emphasize that by doing so we do not prejudge the petitions for reconsideration of our broadband PCS pioneer's preference decision. The payment rule we adopt here will apply to all proceedings in which we made a tentative (but not final) decision regarding preferences as of August 10, 1993 in the three proceedings.

[66] *See Pioneer's Preference Review NPRM.*

[67] *See, e.g., Narrowband Reconsideration*, 9 FCC Rcd 1315-16, para. 44.

[68] 47 U.S.C. § 154(i).

[69] 47 U.S.C. §§ 151, 303(r), 307, 309, 214(c).

[70] *See New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101, 1108 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989) (*quoting North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985)). The reference is to Article I, Section 8, Clause 18 of the Constitution, which authorizes Congress to make all laws that shall be "necessary and proper" for carrying out the enumerated powers "and all other powers" vested in the federal government.

[71] *See North American Telecomm. Ass'n v. FCC*, 772 F.2d at 1292-93.

Assessing an auction-based charge is not contrary to the Supreme Court's decision in *National Cable Television Ass'n v. FCC*, 415 U.S. 336 (1974) (*NCTA*). In that case, as subsequently described, the Supreme Court struck down Commission fees that the Court perceived as an effort "to recover from regulated parties costs for benefits inuring to the public generally." *Skinner v. Mid-American Pipeline Co.*, 490 U.S. 212, 223-24 (1989) (*Skinner*). The Court in *NCTA* said that the only proper measure of the fee was "value to the recipient." 415 U.S. at 342-43, 344. In this instance, we do not seek to recover from APC, Cox, and Omnipoint (and, by extension, from other licensees who pay auction-based charges) "costs for benefits inuring to the public generally." *Skinner*, 490 U.S. at 224. Indeed, the "measure" of the charge for APC, Cox, and Omnipoint is precisely the one identified in *NCTA* as the only proper measure -- the value of the license to the recipient. That value is determined by the auction price -- the value that bidders are willing to pay -- discounted for APC, Cox, and Omnipoint's special circumstances. *See* para. 2020, *supra*. This assessment thus does not raise concerns that the Commission may have used an incorrect standard in setting the charge. 415 U.S. at 343. Moreover, because the action the Commission takes here does not put it "in search of revenue in the manner of an Appropriation Committee of the House," *NCTA*, 415 U.S. at 341, no issue of impermissible delegation of taxing authority arises. *Id.* The charge here is determined directly by the auction process, and not by any concern for raising revenues "to recover administrative costs not inuring directly to the benefit of the parties...." *Skinner*, 490 U.S. at 224.

[72] 520 F.2d 182 (D.C. Cir. 1975).

[73] *Id.* at 204.

[74] 47 U.S.C. § 205.

[75] 659 F.2d 1092 (D.C. Cir. 1981) (*Lincoln Telephone*).

[76] 47 U.S.C. § 203(a).

> Section 203(a)'s terms do not ... in any way suggest that the section provides the exclusive authority under which the Commission can require a tariff to be filed. Thus, while Section 203(a) did not grant the Commission the requisite authority for its action, Section 154(i) did.[77]

31. In *North American Telecomm. Ass'n v. FCC*,[78] the Seventh Circuit affirmed an order requiring the Bell holding companies to file capitalization plans for subsidiary companies organized to sell telephone equipment, even though the Act conferred no authority on the FCC over holding companies and the legislative history of the Act suggested that Congress had considered granting such authority but ultimately had denied it.[79] The court held that the Commission's authority to require the capitalization plans arose under "a separate grant of power" -- Section 4(i).[80] The only real question, the court said, was

> whether the Commission could reasonably conclude that requiring the regional [holding] companies to submit plans of capitalization ... was necessary and proper to the effectuation of [the Commission's order requiring the separation of equipment sales from the companies' telephone operations].[81]

The court answered that question in the affirmative in holding that Section 4(i) authorized this action.

32. In *New England Telephone & Telegraph Co. v. FCC*,[82] the D.C. Circuit affirmed the Commission's order requiring AT&T (along with its former operating companies) to refund rates it had collected in excess of its authorized rate of return, rejecting the telephone companies' argument that the Commission's only statutory authority to require refunds, under Section 204(a)(1),[83] did not apply to their situation. Agreeing with the telephone companies that Section 204 "does not apply to the circumstances of this case,"[84] the court held that the Commission had "properly exercised its authority under section 4(i) to remedy the violation" of its rate of return order.[85] The court found that the Commission's choice of the refund remedy, "[i]n a strictly technical sense," was "absolutely necessary" to the effectuation of its rate of return prescription.[86] But it made clear that the Commission was not required to show that it had selected "the only conceivable remedy in order to invoke its 4(i) powers."[87] It was enough that the action chosen by the agency "was appropriate and reasonable."[88]

33. The rule that emerges from the cases described above is that Section 4(i), although "not infinitely elastic,[89] is a "wide ranging source of authority."[90]

> Section 4(i) empowers the Commission to deal with the unforeseen -- even if that means straying a little way beyond the apparent boundaries of the Act -- to the extent necessary to regulate effectively those matters already within the boundaries.[91]

If an action taken by the agency does not contravene another provision of the Act, it may be justified under Section 4(i) if the Commission "could reasonably conclude that [the action] was necessary and proper to the effectuation" of its functions.[92]

34. Applying this rule here, we find authority under Section 4(i) to amend our pioneer's preference rules to condition any licenses granted to APC, Cox, and Omnipoint, on the basis of their pioneer's preferences, on the payment of an appropriate charge. First, requiring payment by APC, Cox, and Omnipoint is "necessary" if we are properly to carry out our public interest mandate in licensing broadband PCS providers.[93] An important aspect of the public interest is promoting competition to the extent feasible and taking appropriate regulatory steps to ensure that the competition is fair.[94] Our development of PCS and of the pioneer's preference policies appropriately has emphasized competition at every step. Granting APC, Cox, and Omnipoint a license free of charge, we have found in this order, would likely give APC, Cox, and Omnipoint a financial advantage over other licensees competing in the same markets, who would have to pay auction prices -- a result that would not serve the public interest.

35. Second, requiring payment by APC, Cox, and Omnipoint is "necessary and proper" in the execution of our function under Section 309(j) to implement a rational, fair system of competitive bidding. We have found elsewhere that the values of broadband PCS licenses will be significantly interdependent. The prices a bidder might be willing to pay -- or even the willingness to bid at all -- might be affected in various ways by the fact that some of the licenses are available free to applicants who will be competing with the auction winners. Awards to APC, Cox, and Omnipoint free of charge thus might distort significantly the auction of other broadband PCS licenses and, thereby, defeat or at least undermine some or all of the purposes of having the auction. In this regard, we note that

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77 *Lincoln Telephone*, 659 F.2d at 1108-09.
78 772 F.2d 1282 (7th Cir. 1985) (*North American*).
79 *Id.* at 1291-92.
80 *Id.* at 1292.
81 *Id.* at 1293. It is noteworthy that the order requiring structural separation of equipment sales from telephone operations is itself an action not expressly authorized by the Act. Structural separations requirements have been affirmed as proper exercises of the Commission's "ancillary jurisdiction." *See Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 211 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).
82 826 F.2d 1101 (D.C. Cir 1987) (*New England*).
83 47 U.S.C. § 204(a)(1).
84 *New England*, 826 F.2d at 1107.
85 *Id.* at 1109.
86 *Id.* at 1107-08.
87 *Id.* at 1108.
88 *Id.*
89 *North American*, 772 F.2d at 1292.
90 *New England*, 826 F.2d at 1109.
91 *North American*, 772 F.2d at 1292. *See also U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968); *Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988); *FTC Communications, Inc. v. FCC*, 750 F.2d 226, 232 (2d Cir. 1984).
92 *North American*, 772 F.2d at 1293.
93 *See* 47 U.S.C. §§ 307(a), 309(a), 214(a) and (c). *See also* 47 U.S.C. § 151.
94 *See National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 636 and n.25 (D.C. Cir), *cert. denied*, 425 U.S. 992 (1976). See also *McLean Trucking Co. v. U.S.*, 321 U.S. 67, 86-88 (1944).

the auction statute itself does not limit our authority to require pioneer's preference recipients to pay for their licenses; it is neutral on this point.[95] And third, as noted above, requiring payment will serve Section 309(j)'s purpose of avoiding unjust enrichment.

36. We recognize that our decision here is a reversal of the course we took initially with respect to payments made by the broadband PCS pioneers. In this regard, it is similar to our recent decision to require payment by Mtel for its narrowband PCS license after first deciding not to require payment. We asked the court for a remand of the pioneer's preference review order and the broadband PCS pioneer's preference order to give further consideration to this important issue.[96] We believe that this change is well supported by the record and best serves the public interest. When we first considered the payment question these pioneers had only their tentative preferences and, even now, their preferences are the subject of petitions for reconsideration and petitions for review. Thus, not only do we believe that our change of course is legal and best serves the public interest, we also believe it does not undermine any legitimate reliance interests of APC, Cox, and Omnipoint.

D. *Ex Parte* Rules

37. We note that in their briefs to the court, petitioners and *amicus curiae* raised allegations of violations of the Commission's *ex parte* rules. These issues were addressed in a letter by the Managing Director;[97] and our General Counsel reviewed the contacts in depth in preparing a response to a congressional inquiry.[98] We have thus had an opportunity to consider, with substantial staff analysis, the allegations. While the matter has not been formally brought to the Commission, *e.g.*, through an application for review of the Managing Director's letter, we take this opportunity to affirm the Managing Director's letter.

IV. ORDERING CLAUSES

38. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 303(r), 307, 309, and 214 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), 307, 309, and 214, that Section 1.402 of the Commission's rules, 47 C.F.R. § 1.402, IS AMENDED as set forth in Appendix A to be effective thirty (30) days after publication in the Federal Register.

39. Accordingly, IT IS FURTHER ORDERED that the relevant licensing bureau shall impose the following additional condition on any licenses received by pioneer's preference recipients for broadband PCS (GEN Docket No. 90-314) based upon their pioneer's preference awards:

> **Each licensee shall pay to the United States Treasury an amount equal to either ninety percent (90%) of the winning bid for the 30 MHz broadband MTA license in the same market or ninety percent (90%) of the adjusted value of the license calculated based on the average per population price for the 30 MHz licenses in the top 10 MTAs as established at auction, thirty (30) days after an order granting any such license based upon a pioneer's preference, the order granting the preferences, and this order become final orders, that is, thirty (30) days after the order is no longer subject to administrative reconsideration or judicial review, appeal, or stay.**

40. IT IS FURTHER ORDERED that the Emergency Request for Oral Argument filed by American Personal Communications on July 21, 1994 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Part 1 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 1 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Section 1.402 is amended by adding new subsection (g) to read as follows:

> (g) Any person receiving pioneer's preferences in proceedings where tentative (but not final) decisions had been reached as of August 10, 1993, will be required to pay for their licenses. The amount of payment shall be determined in each proceeding on a case-by-case basis.

APPENDIX B

Final Regulatory Flexibility Statement

1. Pursuant to the Regulatory Flexibility Act of 1980, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rule Making in ET Docket No. 93-266. Written comments with a separate and distinct heading designating them as a response to the IRFA were requested. The Commission's final analysis is as follows:

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[95] *See* 47 U.S.C. § 309(j)(6)(b); H.R. Rep. No. 111, 103d Cong., 1st Sess. 257 (1993).

[96] The question of payment was still technically before the Commission as a result of a timely filed petition for reconsideration of the *Pioneer's Preference Review Report and Order*. 47 U.S.C. § 405. *See Wrather-Alvarez Broadcasting v. FCC*, 248 F.2d 646 (D.C. Cir. 1957) (where petition for agency reconsideration is filed, agency has jurisdiction even though other parties have sought judicial review).

[97] Letter from Andrew S. Fishel to Michael K. Kellogg, Esquire (May 27, 1994).

[98] Letter from William E. Kennard to Hon. John D. Dingell (June 3, 1994).

2. **Need for and purpose of this action**. This proceeding was initiated to obtain comment regarding possible modifications to, or repeal of, the pioneer's preference rules. The rule adopted here will serve the public interest by modifying the pioneer's preference rules in light of the statutory authority to assign licenses by competitive bidding.

3. **Issues Raised in Response to the IRFA**. The IRFA noted that the proposed changes could affect small businesses if they have pioneer's requests pending, it they contemplate filing pioneer's preference requests, or if they intend to file applications for services in which others might receive a pioneer's preference. No commenters responded specifically to the issues raised in IRFA. We note that, with regard to PCS, small businesses receive certain competitive bidding preferences as set forth in the Third Report and Order, 9 FCC Rcd 2941 (1994) and the Fifth Report and Order, FCC 94-178 (released Jul. 15, 1994) in PP Docket No. 93-253.

4. **Significant alternatives considered**. All significant alternatives have been addressed in the Memorandum Opinion and Order on Remand.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

fONOROLA Corporation File No. I-T-C-91-103

Application for Authority Under Section 214 of the Communications Act to Resell Facilities of Other Common Carriers to Provide Domestic Carriers Interconnection with Canadian Carriers

and

EMI Communications Corporation File No. I-T-C-91-050

Application for a Certificate of Public Convenience and Necessity Pursuant to Section 214 of the Communications Act, as amended, to Provide International Communications Service between the United States and Canada on a Resale Basis

ORDER ON RECONSIDERATION

Adopted: April 4, 1994; Released: May 6, 1994

By the Commission:

I. INTRODUCTION

1. On December 4, 1992, American Telegraph and Telephone Company (AT&T) filed a petition for reconsideration of our determination that Canada affords resale opportunities equivalent to those available under U.S. law and the accompanying grant of the above-captioned applications of fONOROLA Corporation (fONOROLA) and EMI Communications Corporation (EMI) for authority to resell, *inter alia*, international private lines between the United States and Canada.[1] AT&T generally argues that, in acting on those applications, we focused solely on the issue of nondiscrimination and did not undertake a comparative analysis of the resale opportunities available within Canada and the United States, thus misapplying our equivalency test. Subsequently, fONOROLA, EMI and British Telecommunications plc (BT) (collectively referred to as "Respondents") filed oppositions to the petition and comments, to which AT&T replied. For the reasons discussed below, we deny in part AT&T's petition for reconsideration, and affirm our previous finding that Canada affords resale opportunities equivalent to those available in the United States. In addition, we deny AT&T's alternative request that we adopt new reporting measures and a zero tolerance test for international private line resellers; instead, we hereby establish a general policy pursuant to which we shall require all nondominant international private line resellers to file with the Commission semi-annual traffic reports for the three calendar years following our equivalency determination.[2] In response to BT's comments, we elaborate upon our discussion of t he scope of the condition imposed on all U.S. - Canada private line resale authorizations in the *fONOROLA/EMI Order* which restricts resold international private lines to the carriage of U.S.- Canada traffic only.[3]

II. BACKGROUND

2. On November 4, 1992, we granted fONOROLA and EMI authority to resell, *inter alia*, international private lines between the United States and Canada for the provision of switched services. These authorizations represent the first time we have applied our *International Resale Order*[4] to authorize resale of private lines only to countries determined to afford resale opportunities equivalent to those available in the United States.

3. In the *International Resale Order*, we concluded that the public interest in cost-based international telecommunications services will be served by encouraging the resale of international telecommunications services, including private lines. We further stated that we expect the resale of international private lines to exert pressure on foreign administrations to bring high collection and above-cost accounting rates closer to cost.

4. We recognized, however, that the nature of international communications, where the two ends of a circuit are under the jurisdiction of different governments, would give the foreign carrier the unilateral ability to evade the international settlements process (ISP) by allowing only "one-

[1] 7 FCC Rcd 7312 (1992) (*fONOROLA/EMI Order*). Subsequently, EMI's authorization was amended to allow the provision of facsimile, data, and international message telephone services over resold international private lines. *See* EMI Communications Corporation, DA 94-111 (adopted January 13, 1994).

[2] AT&T raised the same issues discussed in this petition for reconsideration in comments filed on all of the U.S. - Canada international private line resale Section 214 applications filed subsequent to the fONOROLA and EMI applications. All of the applicants opposed AT&T's proposed reporting requirements. We deferred the issues in all such Section 214 international private line resale authorizations for resolution in this proceeding and made the authorizations subject to modification based on the outcome of this proceeding. Therefore, this reporting requirement applies to those international private line resellers as well. We will ensure that actual notice is served upon each of these international private line resellers. For further discussion, *see, infra.*, paras. 17-20.

[3] Although AT&T characterizes BT's pleading as a petition for reconsideration and, thus, argues that its petition was filed outside the statutory filing period, we accept BT's pleading as comments.

[4] In the Matter of the Regulation of International Accounting Rates Proceeding, Phase II, First Report and Order (*International Resale Order*), 7 FCC Rcd 559 (1992). *See also*, In the Matter of the Regulation of International Accounting Rates Proceeding, Phase II, Order on Reconsideration and Third Further Notice of Proposed Rulemaking (*Order on Recon.*), 7 FCC Rcd 7927 (1992).

way" resale into the United States.[5] In an effort to safeguard the U.S. public interest against the negative impact of "one-way" resale, *i.e.*, the exacerbation of the enormous U.S. net settlements deficit to the detriment of U.S. ratepayers and the lack of pressure on foreign administrations to lower their accounting and collection rates, we conditioned our policy by requiring private line resale applicants to demonstrate that resale opportunities equivalent to thoseavailable under U.S. law are afforded by the destination foreign country.

5. The *International Resale Order* did not adopt a set of defined criteria for measuring whether equivalency exists in a particular foreign country, but indicated that, at a minimum, we expect equivalent resale opportunities will include open entry for, and nondiscriminatory treatment of, U.S.-based carriers.[6] We also noted that a demonstration of equivalent resale opportunities may address a wide range of issues, including licensing, tariffing, and terms and conditions associated with provision of services.

6. In the *fONOROLA/EMI Order*, we reviewed the Canadian regulatory, legal and market conditions presented in the record and found that, taken as a whole, the resale conditions in Canada afford open entry for, and nondiscriminatory treatment of, U.S.-based resellers, and are equivalent to those available in the United States. More specifically, we concluded that the licensing scheme, tariffing requirements, ability to interconnect to the PSN at both ends, terms and conditions for resale of WATS/volume discount services, line-side access coupled with discounted contribution charges, and foreign ownership policy do not raise barriers for U.S.-based resellers to enter and participate effectively in the Canadian resale market. Therefore, upon consideration of the complete record, we determined that Canada affords private line resale opportunities equivalent to those available in the United States.

III. DISCUSSION

7. In its petition, AT&T urges us to reconsider our equivalency finding for Canada, or, if we reaffirm that finding, to state clearly that the *International Resale Order* 's equivalency test requires a demonstration of both nondiscrimination and the availability of equivalent resale opportunities. Alternatively, AT&T asks us to adopt new traffic reporting requirements for international private line resellers and a "zero tolerance" test for traffic imbalances. We address these issues in turn below.

8. AT&T asserts that the primary purpose of the Commission's international private line resale policy is to reduce above-cost accounting rates, as well as the U.S. net settlements deficit and the burden that deficit imposes on U.S. ratepayers.[7] To achieve these goals, AT&T argues that it is not sufficient for us to determine that U.S.-based carriers are subject to nondiscriminatory treatment, but that we must also consider what impact resale under existing conditions in Canada will have on the U.S. - Canada settlements deficit. AT&T argues that we misapplied our equivalency test by focusing solely on whether Canada applies its resale rules and regulations to U.S.-based resellers on a nondiscriminatory basis, rather than on whether the actual regulatory policies, technical and market conditions in Canada are equivalent to those in the United States. AT&T concludes that we should determine equivalency by assessing whether the rules and regulations in Canada apply nondiscriminatorily, whether the resale opportunities in Canada are equivalent to those available in the United States, and, finally, whether differences in resale opportunities could result in imbalanced traffic streams and increased U.S. net settlements outpayments.[8] fONOROLA and EMI respond that AT&T's argument reflects an "erroneous construction" of the purpose of the *International Resale Order* and the equivalency standard, and that AT&T is now urging that determinative weight be given to a single factor -- settlements imbalances between the United States and Canada.[9]

9. We reject AT&T's narrow characterization of our international private line resale policy as a vehicle adopted solely to reduce above-cost accounting rates and the U.S. net settlements deficit.[10] Rather, the broader goal of our *International Resale Order* is to promote the U.S. public interest in cost-based international telecommunications services by introducing resale of international private lines as an alternative to currently high-cost international telecommunications services. More specifically, our expectations are that the extension of our domestic policy of unlimited resale of private lines into the international market will yield the same public benefits that resale has yielded in the domestic market -- increased demand, new services, reduced prices for most telecommunications services and less opportunity for price discrimination.[11]

10. Although we favor a policy of unlimited resale in both the domestic and international markets, we recognized the need to condition our policy to protect against the potential undesirable effects of "one-way" resale on our net

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[5] "One-way" resale refers to a policy by the administration at the foreign end of an international circuit which permits entities in that country to resell international private lines into the U.S. and to interconnect the private lines to the U.S. public switched network (PSN), but does not permit entities in the U.S. to resell international private lines into that country or to interconnect them to that country's PSN. *See International Resale Order*, 7 FCC Rcd at 561. Permitting "one-way" resale would result in U.S. inbound switched traffic, which is otherwise carried over the PSN and settled under the ISP, being diverted to private lines, with no possibility of U.S. outbound switched traffic being similarly diverted. Such unilateral diversion of switched traffic would decrease the number of U.S. inbound switched minutes and the accompanying settlements payments to U.S. carriers, without any corresponding ability to decrease the number of U.S. outbound switched minutes and accompanying settlements payments by U.S. carriers.

[6] *See International Resale Order*, 7 FCC Rcd at 562.

[7] *See* AT&T Petition at 4 and 13, Reply at 8.

[8] *Id.* at 2.

[9] *See* fONOROLA Opposition at 7 and EMI Opposition at 2-3, 6.

[10] We anticipate that private line resellers will offer service at collection rates (prices charged to users) lower than those charged by existing underlying service providers, which could lead the underlying facilities-based service providers to reduce their own collection rates in response to the reseller competition. Such reductions in collection rates should ultimately result in the underlying facilities-based service providers' agreeing to lower their accounting rates toward costs.

[11] *See International Resale Order*, 7 FCC Rcd at 560.

settlements deficit.[12] We accordingly conditioned our international resale policy with an equivalency requirement to ensure that the unilateral diversion of switched traffic to private lines would not occur (*e.g.*, that not only traffic inbound to the United States would be diverted), or at least that U.S. entities, faced with diversion of inbound traffic to resellers, would have a reasonable opportunity to respond to that diversion by entering the resale market and diverting outbound traffic.

11. We agree with AT&T that the *International Resale Order*'s equivalency test requires both a showing of nondiscrimination and equivalent resale opportunities. Our overall analysis of whether equivalency exists in the destination foreign country includes both a specific examination of whether U.S.-based carriers are afforded nondiscriminatory treatment and a comparative review of whether the existing resale conditions and opportunities in the foreign and U.S. market are equivalent. The issue of nondiscrimination is significant, but is not the sole element of our analysis of whether equivalent resale opportunities exist. The *International Resale Order* did not identify specific criteria required for a successful demonstration of equivalency. We explicitly stated, however, that open entry for, in addition to nondiscriminatory treatment of, U.S.-based carriers must, at a minimum, be present.[13]

12. Nevertheless, we did not intend to require that every Canadian policy, regulation and market condition affecting resellers must mirror those in the United States. The equivalency requirement is intended to protect U.S. ratepayers from the harmful effects of "one-way" resale on the U.S. net settlements deficit. We never intended our equivalency requirement to guarantee that diversions of inbound IMTS traffic to private lines would be offset by exactly equal diversions of outbound IMTS traffic to private lines. Indeed, in light of the current significant differentials between U.S. and foreign collection rates for inbound and outbound IMTS traffic, such an expectation would probably be unrealistic. Because foreign collection rates for inbound traffic to the United States are typically much higher than U.S. collection rates for outbound traffic, a reseller would have a greater margin for reducing inbound collection rates than it would have for reducing outbound collection rates. Similarly, a user in the foreign country might well have a greater economic incentive to shift to a reseller than would a user in the United States.

13. Requiring Canada to reflect virtually identical opportunities and policies as a prerequisite to authorizing private line resale, as AT&T suggests, is unnecessary to protect against the harmful effects of "one-way" resale and, in effect, could forestall the public benefits we expect from international private line resale, including the exertion of downward pressure on the currently high Canadian collection rates for IMTS traffic to the United States. We thus do not agree with AT&T that our equivalency test requires us to look at and measure the effect of each and every Canadian law or policy on the balance of inbound and outbound private line resale traffic.[14]

14. In applying the equivalency test in the *fONOROLA/EMI Order*, we examined the regulatory, legal and market conditions presented in the record and found that the Canadian rules and regulations provide open entry for, and nondiscriminatory treatment of, U.S.-based carriers. Furthermore, we specifically examined resale conditions in Canada -- including the licensing scheme, tariffing requirements, ability to interconnect to the PSN at both ends, terms and conditions for resale of WATS/volume discount services, line-side access coupled with discounted contribution charges, and foreign ownership policy[15] -- and found that these afford U.S.-based carriers opportunities to enter and compete in the Canadian resale market that are substantial and similar to those available in the U.S. market.[16]

15. Although previously addressed in the *fONOROLA/EMI Order*, AT&T again raises the issue of the availability of only line-side access in Canada compared to the availability of trunk-side access in the United States as an example of an existing differing condition which may affect the flow of switched traffic over the international private lines between the United States and Canada. However, we note that any additional investments required by resellers in Canada to replicate the network functionality of direct trunk-side connections may impact equally the flow of northbound and southbound U.S.-Canada resale traffic. Although we agree with AT&T that trunk-side access would be preferable, we find that resellers in Canada are

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[12] *See* n.4, *supra*.

[13] *See International Resale Order*, 7 FCC Rcd at 562. Furthermore, we also emphasized that we placed primary importance on ensuring that all U.S.-based carriers may provide service on price, terms and conditions equivalent to those afforded foreign-based competitors, including those competitors that have an ownership interest in, or sufficiently close corporate relation with, a carrier that either holds some form of privileged access to that country or exercises control over bottleneck facilities. *Id.*

[14] We believe, in any event, that such an analysis would be difficult to make. Since we are asked to measure equivalency before international resale between the United States and the foreign country has been introduced, there are obviously no traffic data on which to base such an analysis. Furthermore, we believe that any attempt to project the hypothetical effects of a particular policy would be speculative and of limited value. However, we note that fONOROLA has filed with the Commission its quarterly traffic reports and has reported that its ratio of northbound to southbound minutes was approximately 1.52 for the month of July 1993 and is expected to increase. *See* Letter dated August 23, 1993 from Jan Peeter, President and CEO, fONOROLA to Kathleen Levitz, Chief, Common Carrier Bureau.

[15] We note that Canada's foreign ownership policy has recently been enacted into law. *See* An Act respecting Telecommunications (*The Telecommunications Act*), assented to June 23, 1993.

[16] We note that since adoption of the *fONOROLA/EMI Order* the CRTC has taken several significant steps which further ensure the equivalency of the Canadian resale market. For example, in the original *fONOROLA/EMI Order* proceeding, AT&T argued that the lack of trunk-side access and of number portability in the Canadian resale market were factors which did not permit an equivalency finding for Canada. Recently CRTC has taken positive action on both of these issues. With respect to 800 number portability, as of January 29, 1994, it is available between the United States and Canada. However, the issue of multi-carrier selection capability for 800 services has been a topic of significant debate in Canada. On March 29, 1994, CRTC found that "multi-carrier selection is a bottleneck feature which would offer greater customer choice and flexibility and therefore be a desirable component of 800 Access Service." *See March 1994 Regulatory Highlights*, Bell Canada. In light of this finding, CRTC has directed carriers to file a proposed tariff for an 800 Access service which would provide for multi-carrier selection capability within 60 days. For discussion of trunk-side access, *see, infra.*, para. 15.)

compensated for the non-equal access interconnection by discounted contribution charges.[17] After the pleading cycle for this reconsideration closed, the Canadian-Radio Television Commission (CRTC) issued a decision in which it ordered that resellers should be provided with trunk-side access to the public switched network.[18] Pursuant to the *Trunk-Side Access Order*, resellers electing line-side connections will continue to pay discounted contribution charges; however, resellers electing to have trunk-side connections will pay the interexchange carrier level of contribution charges.[19]

16. Our evaluation of whether Canada affords equivalent resale opportunities in the *fONOROLA/EMI Order* included not only a consideration of whether U.S. carriers are afforded nondiscriminatory treatment, but also a full analysis of whether generally the Canadian resale market affords U.S.-based resale carriers opportunities equivalent to those available in the U.S. resale market. Thus, our previous equivalency determination for Canada was based on the specific conditions of the Canadian market and regulatory environment,[20] including the elements of transparency, open entry, nondiscriminatory treatment and the ability to interconnect at both ends. We find nothing in AT&T's petition that demonstrates that our review overlooked or misapplied any significant factors in this analysis, and we accordingly reaffirm our equivalency determination for Canada.

17. We now turn to AT&T's proposal for additional reporting requirements for resellers. AT&T urges us to adopt specific additional monthly reporting requirements for all international private line resellers for the purpose of monitoring the net settlements impact of permitting international private line resale between the United States and Canada. AT&T argues that our resale policy is "untried" and that these additional monthly reporting requirements would enable us to determine in a timely manner the effects of our having authorized international private line resale on a particular route (in this case, the Canada-U.S. route) to ensure that U.S. ratepayers are not required to bear additional settlements burdens.[21] It is critical, asserts AT&T, that we (a) require fONOROLA, EMI and any other authorized international private line resellers to file monthly reports of the billed minutes provided via the interconnected private lines, separately by service category for northbound and southbound traffic; (b) place those reports on public notice for full review; and (c)continuously monitor, through the monthly reports, the traffic served via international private line resale with Canada.

18. In conjunction with the monthly reports, AT&T also proposes a "zero tolerance" test which would require us to suspend immediately authorizations for private line resale between the United States and Canada if for three consecutive months the traffic reports were to demonstrate an increase in U.S. outpayments attributable to more southbound than northbound minutes being diverted to international private lines.[22] The "zero tolerance" test, claims AT&T, is necessary to protect U.S. ratepayers in a timely manner from increased U.S. settlements outpayment. Respondents, however, argue that AT&T's proposed monthly reports and the zero tolerance test are anticompetitive and would make it impossible for resellers to engage in long range business and network planning. They further argue that the monthly reports would be overly burdensome and that resellers are currently subject to sufficient reporting requirements. Finally, they observe that there are other factors that affect traffic streams between countries, such as calling patterns and USA-direct type services.[23]

19. After reviewing the arguments of the parties, we decline to adopt AT&T's proposed monthly reporting requirements and its accompanying zero tolerance test. Specific monthly fluctuations in traffic balances can not be the proper measure of the success of our international resale policy. As noted by Respondents, such fluctuations can be affected by a variety of factors, including variations in collection rates, calling patterns, use of U.S. carriers' calling cards, and Country Direct offerings. We also agree with Respondents that adoption of AT&T's proposals would likely unnecessarily place resellers at a competitive dis-

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[17] We note that U.S. resellers are now able to access Stentor facilities on a switchless basis through Bell Canada's General Tariff for "Advantage Preferred Services". *See* Bell Canada, General Tariff, effective January 10, 1994.) This service combined with the availability of answer supervision (at a monthly rate of $5 per 64-Kbps equivalent circuit effective January 6, 1994) means that a carrier can have terminating ubiquity in Canada without the need to install a switch.

[18] *See Trunk Side Access by Resellers to the Public Switched Telephone Network*, CRTC Telecom Decision 93-8, (released July 23, 1993) (*Trunk-Side Access Order*).

[19] For description of the various levels of applicable contribution charges, *see Competition in the Provision of Public Long Distance Voice Telephone Services and Related Resale and Sharing Issues*, CRTC Telecom Decision 92-12 (1992) (*CRTC Competition Order*).

[20] We note again that the *International Resale Order* did not adopt a set of defined criteria for purposes of measuring the equivalency of a particular foreign market, recognizing that individual foreign telecommunications resale markets may be characterized by factors unique to their own regulatory structure. For example, the presence in another foreign resale market of those elements of the Canadian resale market which permitted an equivalency finding for Canada, such as the licensing scheme, the availability of volume discount services, and the tariffing requirements, do not automatically ensure an equivalency determination for the subject foreign resale market. Rather, we must evaluate whether those elements when combined with other factors present in the subject foreign resale market constitute an equivalent resale market. Therefore, we recognize that the presence of conditions which permit a finding of equivalency for one country, Canada, may not necessarily be controlling factors for subsequent determinations.

[21] AT&T also argues that there is no actual empirical evidence that international private line resale will in fact place pressure on foreign administrations to lower their accounting rates toward costs. *See* AT&T Petition at 3.

[22] AT&T observes that fONOROLA's traffic projections indicate a 25: 1 ratio of southbound to northbound minutes as an example of the result of resale in non-equivalent conditions. *See* AT&T Petition at 4, n.3 and 17. fONOROLA responds that its business plans are due to it being affiliated with a Canadian reseller with an established market base in Canada. It expects to increase its northbound minutes as soon as it is able to build a marketing presence in the United States. *See* fONOROLA Opposition at 15. Subsequently, fONOROLA filed its quarterly traffic reports. *See* n.13, *supra*.

[23] In response, AT&T points out that it does not offer USA-direct service from Canada as it is for U.S.-overseas calling only. We note, however, that U.S. carriers' calling card services are available to customers in Canada. Thus, as with USA-direct type services, a call originated in Canada destined for the United States using a U.S. carrier's calling card results in U.S. outbound settlement minutes for purposes of the ISP.

advantage by creating market and financial uncertainty and by hampering the availability of long-term financing for resellers, which ultimately could inhibit their entry into the market. Finally, we believe AT&T's specific proposals could in fact have the negative effect of discouraging foreign administrations from opening up their own markets to resale if their own foreign-based private line resellers operating in the United States risk suspension of their authorizations due to an imbalance in traffic streams. Thus, we conclude that adoption of both the proposed monthly reporting measures and the zero tolerance test would, in effect, frustrate the broader goal of our *International Resale Order*, to further competition in the international resale market in order to obtain the public interest benefit of cost-based telecommunications services. We prefer to let the resale market operate and to look at the results over time once we have found resale market conditions to be equivalent for a particular country. Finally, if necessary, we have ample authority to correct any problems that may occur.

20. We note, however, that while current annual reports filed by all dominant and nondominant U.S. carriers provide adequate data for the Commission to monitor general international traffic patterns, there is a significant time delay between the initiation of the private line resale offerings and release of this data. We also recognize that our determination that Canada affords equivalent resale opportunities and subsequent Section 214 authorizations for international private line resale represent the first implementation of our international private line resale policy. Thus, our principal concern arises from the frequency of the filing of the particular reports, not the content of the reports themselves.[24] Therefore, to provide a timely means ofensuring that our policy is having its intended effect, we establish a policy requiring all nondominant international private line resellers providing switched or interconnected international private line services between the United States and Canada during the first three years after the Commission's equivalency determination to file with the Commission on a semi-annual basis the information contained in the annual traffic reports.[25] Because fONOROLA is still subject to dominant carrier regulation,[26] in this order, we require only EMI to file prospectively these semi-annual traffic reports. Furthermore, we note that we resolve herein the issue of reporting requirements which we had deferred from previous grants of international private line resale authority to this specific proceeding. Thus, all nondominant international private line resellers whose Section 214 authorizations were made subject to modification based on the outcome of this proceeding, are subject to the requirement to file with the Commission semi-annual traffic reports. After the first three years of equivalency, nondominant international private line resellers need only file traffic reports on an annual basis pursuant to Section 43.61 of the Commission's Rules.[27]

21. We next address BT's comments on the scope of the condition imposed in the fONOROLA and EMI Section 214 authorizations which restricts the resold international private lines to carriage of U.S. - Canada traffic only.[28] Specifically, BT inquires as to whether such limitation bars use of U.S. - Canada private lines for the carriage of traffic ultimately destined to reach countries that the Commission determines equivalent. In the *fONOROLA/EMI Order*, we imposed a condition of "U.S. - Canada traffic only" on all U.S. - Canada private line resale authorizations. Our primary purpose was to prevent our resale policy from being undermined by having resale traffic routed to "non-equivalent" third countries. Canada, however, has a regulatory policy requiring "maximum use" of Canadian facilities for the routing of Canadian traffic, whereas the United States has no similar broad policy which mandates that U.S. carriers, whether U.S.- or foreign-owned, maximize use of U.S. common carrier facilities for U.S.-originated traffic. Therefore, in addition to our concerns of routing traffic through Canada to non-equivalent third countries, we are also concerned about the potentially uneconomic routing decisions required by resellers operating in the Canadian market under the "maximum use" policy. As AT&T correctly asserts, this Canadian policy disadvantages U.S.-based carriers competing in the Canadian market to the extent

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[24] U.S. carriers, including private line resellers, that provide international communications services are required to file annual reports with the Commission pursuant to Section 43.61 of the Commission's Rules that summarize service to and from the United States and other countries and locations throughout the world. The data submitted in these reports include billed messages, settlement minutes, revenue billed to customers in the United States, settlement payments owed to foreign correspondents on U.S. billed service, and settlement payments owed to U.S. carriers on foreign billed service. These reports also require detailed information on private line and leased circuit services, including the number of leased channels and associated revenues for service between the various U.S. points and other locations for each service classification. In addition, the Commission collects and catalogues data on accounting rates pursuant to Section 43.51 of the Commission's Rules. The combination of accounting rate data and traffic and revenue information enables the Commission to track and analyze changes in accounting rates for each country or location and to detect any significant changes in service between the United States and other countries that deviate substantially from historic patterns. Moreover, since each carrier must file a report with the Commission, shifts of service among carriers and resellers can be discerned.

[25] Under this policy, we shall condition each Section 214 authorization granted to a nondominant international private line reseller with the requirement to file a semi-annual report with the Commission not later than September 31 for the first six-month calendar period, and March 31 for the second six-month calendar period. We note that this policy does not extend to dominant international private line resellers, and thus does not affect the existing requirement that all dominant international private line resellers file with the Commission quarterly traffic reports. This condition also applies to all previously granted Section 214 international private line resale applications that were subject to the outcome of this proceeding. *See* note 2, *supra*.

[26] As a dominant carrier, fONOROLA is required to file quarterly traffic reports. We note, however, that fONOROLA has filed a request for reclassification from dominant to nondominant status. *See Application of fONOROLA Corporation for Modification of Regulatory Status from Dominant to Nondominant*, File No. I-T-C-93-001-ND.

[27] The semi-annual traffic report shall be filed for traffic handled through December 1995. Therefore, we will require the last report by nondominant international private resellers to be filed no later than March 31, 1996.

[28] We note that neither fONOROLA nor EMI (nor any other currently authorized private line resellers) has sought such clarification or modification of their authorizations to Canada and that no other country has yet been determined equivalent.

they are denied the opportunity to make economically-based routing decisions regarding the routing of Canada traffic. For example, as Teleglobe is the monopoly international service provider for all Canada-overseas traffic, all resale carriers, whether U.S.- or Canadian-based, competing in the Canadian market must route all overseas traffic over Teleglobe's facilities, and are denied the option of routing such traffic via the United States and U.S. facilities, even if that routing were more efficient. By contrast, a Canadian-based carrier competing in the U.S. market would have the opportunity to choose to route U.S. traffic over any facilities, U.S. or Canadian, based on the routing efficiencies. This disparity in the regulatory frameworks in the United States and Canada could well place U.S.-based carriers at a disadvantage.[29]

22. Thus, while we agree with BT generally that our resale policy would not appear to be undermined by the routing of traffic over resold international private lines through one "equivalent" country to a third equivalent country, Canada, represents a unique situation due to its "maximum use" policy explained above. There is the real potential for U.S. carriers to be placed at a competitive disadvantage and the ensuing possibility of a unilateral distortion of traffic streams from increased routing of U.S.-third country traffic through Canada, and, therefore, we reaffirm the necessity of maintaining the condition that resold international private lines between the United States and Canada carry U.S. - Canada traffic only. Additionally, we find that this general condition effectively addresses concerns that the Canadian routing restrictions would otherwise render the Canadian resale market inequivalent.

23. Finally, in response to AT&T, it is clear that all U.S. carriers seeking to provide cross-border services between the United States and Canada, whether U.S.- or Canadian-based, are required to obtain the appropriate Section 214 authorization. All resellers, whether dominant or nondominant, are required to be certificated for each individual country to which they intend to provide service, regardless of the intended routing of the traffic.[30]

IV. CONCLUSION

24. This Order address two requests in a petition for reconsideration filed by AT&T and comments by BT. First, we deny AT&T's request to reconsider our previous finding that Canada affords resale opportunities equivalent to those available in the United States. Second, we deny AT&T's alternative request that we adopt new reporting measures and a zero tolerance test for international private line resellers; instead, we hereby establish a general policy under which we shall condition each Section 214 authorization for international private line resale granted to a nondominant carrier to require the filing with the Commission of semi-annual traffic reports for the first three calendar years following our equivalency determination. Third, in response to BT, we elaborate on our condition of "U.S. - Canada traffic only" and reaffirm that we continue to require all resold international private lines between the United States and Canada to carry only U.S. - Canada traffic, regardless of third country equivalency determinations. In conclusion, as noted in the *International Resale Order* based on our experience in the U.S. domestic telecommunications market, we fully expect the authorization of international private line resale between the United States and equivalent foreign countries to lead to significant consumer benefits. Such benefits include lower prices, innovative services, increased competition, and increased responsiveness to consumers needs, all of which in turn should stimulate U.S. economic growth.

V. ORDERING CLAUSE

25. Accordingly, IT IS HEREBY ORDERED that the petition for reconsideration filed by AT&T is DENIED IN PART and GRANTED IN PART.

26. IT IS FURTHER ORDERED that EMI, as a nondominant international private line reseller, shall file on a semi-annual basis with the Commission the information contained in the annual traffic reports filed pursuant to Section 43.61 of the Commission's Rules for traffic through December 1995.

27. This Order is effective upon release. Petitions for reconsideration under Section 1.106 may be filed within 30 days of this Order's public notice date (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[29] *See Optel Communications, Inc.*, 8 FCC Rcd 2267 (1993).
[30] *See International Resale Order*, 7 FCC Rcd at 562.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 17, 1994

PACIFIC BELL FILES REVISION TO ITS COST ALLOCATION MANUAL TO UTILIZE A STATISTICAL SAMPLING PROCESS FOR MARKETING EMPLOYEE TIME REPORTING

On July 20, 1994, Pacific Bell (Pacific) filed a revision to its cost allocation manual (CAM) for the separation of regulated and nonregulated costs. Pacific's revision describes its statistical sampling process in which coding analysts will convert time reported by sampled sales personnel into the accounting codes for the activities performed. The sample results are then applied to all sales personnel in the sample population. Pacific states that only sales personnel whose salary expense is classified to Account 6612, Sales, are eligible for this sampling process. Pacific claims that this proposed statistical sampling will not change cost pools nor cost pool allocation methods.

Parties may file comments on Pacific's CAM change no latter than **September 13, 1994**. Replies should be filed by **September 28, 1994**. Comments should reference AAD 94-96. A copy of each pleading should be sent to Ed Dashkin, FCC, Common Carrier Bureau, 2000 L St., N.W., Suite 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L St., N.W., Suite 812, Washington, D.C. Copies are also available from ITS.

For further information contact Ed Dashkin at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SUBURBAN CABLEVISION

Petition for Stay of Local
Rate Order of State of New Jersey
Board of Regulatory Commissioners
in Livingston, NJ (NJ0162), *et al.*[1]

ORDER

Adopted: August 9, 1994; Released: August 10, 1994

By the Chief, Cable Services Bureau:

1. In this Order, we deny the Request for Emergency Stay, filed by Suburban Cablevision ("Suburban") on July 15, 1994, of the local rate order adopted by the State of New Jersey Board of Regulatory Commissioners ("Board") on July 6, 1994.[2] In its Order, the Board establishes rates for basic tier service and associated equipment and requires Suburban to issue subscriber refunds, dating back to September 1, 1993, for charges in excess of the newly established rates.[3] The local rate order required Suburban to submit a revised FCC Form 393 reflecting these changes and to submit an accounting for the refunds by July 21, 1994. The only issue raised by Suburban in its petition for stay concerns an allegedly erroneous inflation adjustment mandated by the Board. Based on this error, Suburban seeks a stay of the local rate order pending Commission resolution of its appeal on the merits. The Board opposes the petition.[4]

2. The Board asserts that Suburban used an incorrect inflation adjustment when calculating its maximum permitted rate per channel in its FCC Form 393. In its stay petition, Suburban explains that it used "a 'starting' inflation figure for September 1992 of 121.8."[5] According to the Board, Suburban should have employed an inflation adjustment of 122.5,[6] resulting in a reduction in Suburban's maximum permitted monthly basic rate from $10.49 to $10.39. As both parties have acknowledged, the U.S. Department of Commerce published an updated inflation factor of 122.5 for the Third Quarter of 1992 on August 31, 1993.[7] In addition, the Commission has indicated in a recent Order and in Public Notices that the most recent data available to the public should be used for these calculations.[8]

3. The Commission evaluates petitions for stay under well-settled principles. To support a stay, a petitioner must demonstrate: (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay.[9] As discussed below, we find that Suburban's stay petition does not demonstrate likelihood of success on the merits and, therefore, should be denied.

4. A review of Suburban's Form 393 submission indicates that the earlier inflation figure was used to calculate certain data but that updated figures were entered on other lines.[10] Specifically, the old data (reflecting an inflation factor of 121.8) was used to calculate Line 123, but updated data (reflecting an inflation factor of 125.6 and a time period of 13 months) were entered on Lines 122 and 124. Because our policies and regulations do not appear to permit such partial "refreshment" of data and because

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[1] The communities affected by this Order include the following: Livingston, NJ (NJ0162); West Caldwell, NJ (NJ0163); Irvington, NJ (NJ0164); West Orange, NJ (NJ0165); Fairfield, NJ (NJ0186); Verona, NJ (NJ0187); Maplewood, NJ (NJ0188); Harrison, NJ (NJ0189); Caldwell, NJ (NJ0193); Roseland, NJ (NJ0194); Orange, NJ (NJ0202); Belleville, NJ (NJ0220); Bloomfield, NJ (NJ0221); Union, NJ (NJ0222); Hillside, NJ (NJ0223); Essex Fells, NJ (NJ0225); Millburn, NJ (NJ0246); Roselle Park, NJ (NJ0247); Roselle, NJ (NJ0248); Westfield, NJ (NJ0249); Linden, NJ (NJ0250); Summit, NJ (NJ0261); Springfield, NJ (NJ0272); Montclair, NJ (NJ0273); Berkeley Heights, NJ (NJ0323); New Providence, NJ (NJ0324); Seacaucus, NJ (NJ0325); Woodbridge, NJ (NJ0329); Perth Amboy, NJ (NJ0350); Kenilworth, NJ (NJ0351); Scotch Plains, NJ (NJ0352); Clark, NJ (NJ0353); Rahway, NJ (NJ0354); East Orange, NJ (NJ0358); Cranford, NJ (NJ0360); Winfield, NJ (NJ0361); Fanwood, NJ (NJ0369); Garwood, NJ (NJ0378); Mountainside, NJ (NJ0396); Carteret, NJ (NJ0402); South River, NJ (NJ0443); Glen Ridge, NJ (NJ0545).

[2] Along with its petition for stay, Suburban filed an Appeal of Local Cable Rate Order on July 15, 1994.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[4] An "Opposition of New Jersey Board of Public Utilities, Office of Cable Television, to Request for Emergency Stay and Appeal of Local Cable Rate Order" ("Opposition") was late-filed with the Commission on July 26, 1994. Because Suburban's "Request for Emergency Stay" was not served on the Board within the time designated for filing an opposition, we will accept this late-filed response.

[5] *See* Request for Emergency Stay at 4.

[6] *See* Opposition at 5.

[7] *See* U.S. Dept. of Commerce, *Survey of Current Business*, 101 (Table 7.3) (August 31, 1994).

[8] *See* In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, *Third Order on Reconsideration* in MM Docket No. 92-266, FCC 94-40 (released March 30, 1994) at paras. 93-94; Public Notice, "Cable Television Rate Regulation: Questions and Answers Relating to FCC Form 393," Question 10 (July 30, 1993); Public Notice, "Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements," Question 9 (November 10, 1993).

[9] *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985) (per curiam); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

[10] *See* FCC Form 393 filed by Suburban Cablevision, Part II, Lines 122-124 (November 12, 1994).

Suburban has failed to explain its inconsistent use of inflation data, we conclude that Suburban has failed to demonstrate a likelihood of success on the merits of its appeal. Because we find that Suburban has not shown that it is likely to succeed on the merits of its appeal, we need not discuss the other standards for granting the stay. We conclude that its Request for Emergency Stay should be rejected.

5. Accordingly, IT IS ORDERED that the Request for Emergency Stayp filed by Suburban Cablevision IS DENIED.

6. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 11, 1994

FURTHER COMMENT SOUGHT ON PLAN FROM UTAM, INC., REGARDING FINANCING AND MANAGING 2 GHZ MICROWAVE RELOCATION (GEN DOCKET NO. 90-314)

In the *Second Report and Order* establishing the regulations for an unlicensed Personal Communication Service (PCS) in Part 15 of its regulations, the Commission designated UTAM, Inc., as the coordinator for the transition of the spectrum from fixed microwave service to unlicensed PCS.[1] UTAM would be responsible for administering the transition, including negotiating costs of relocation, ensuring that comparable facilities are provided, and resolving disputes of interference to fixed microwave operation from unlicensed PCS stations. Further, we required that any unlicensed PCS device or system be coordinated through UTAM before being initially deployed or subsequently relocated. All applicants for FCC equipment authorization of unlicensed PCS devices were required to be participants in UTAM.

The above decisions were conditioned on UTAM's submission and our acceptance of: 1) a funding plan that is equitable to all prospective manufacturers of unlicensed devices; and, 2) a plan for band clearing that will permit the implementation of nomadic devices and, in particular, nomadic data PCS devices, as promptly as possible. We added that, at a minimum, such a plan should include estimated time tables and priorities for clearing significant portions of the PCS unlicensed band, should address specifically the issue of nomadic data PCS devices, and should address how the plan ensures that such devices can be implemented as expeditiously as possible. We also stated that we intended to obtain public comment on these plans before acting on them.

On August 1, 1994, UTAM, Inc., filed its plans for financing and managing the relocation of fixed microwave stations. Pursuant to Sections 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 303(r), we are hereby soliciting additional comment in GEN Docket No. 90-314 on the UTAM proposal and whether it adequately addresses the Commission's concerns. Comments on these issues must be filed on or before **September 12, 1994**. Reply comments must be filed on or before **September 27, 1994**. To file formally in this proceeding, you must file an original and four copies of all comments and reply comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554.

The UTAM filing, along with all comments and reply comments in this proceeding, including those filed in response to this Public Notice, are available for public inspection as part of the record in GEN Docket No. 90-314 during normal business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D. C. All or part of the text of these filings may be purchased from the Commission's copy contractor, International Transcription Service, 1919 M Street, N.W., Room 246, Washington, D.C. 20554, telephone (202) 857-3800.

By the Chief Engineer.

For additional information regarding this Public Notice, contact David Means, Office of Engineering and Technology, FCC, telephone (301) 725-1585, extension 206.

FEDERAL COMMUNICATIONS COMMISSION

[1] *See, Second Report and Order*, GEN Docket No. 90-314, 8 FCC Rcd. 7700 (1993), at para. 83-91. *See*, also, *Memorandum Opinion and Order*, GEN Docket No. 90-314, FCC 94-144, 59 Fed. Reg. 38830, June 24, 1994, at para. 209-223. *See*, also, 47 CFR Section 15.307. The frequency band established for unlicensed PCS is 1910-1930 MHz. *See* 47 CFR Section 15.301.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-54

In the Matter of

Equal Access and Interconnection Obligation Pertaining to Commercial Mobile Radio Service — RM-8012

Motion for Extension of Time

ORDER

Adopted: August 11, 1994; Released: August 11, 1994

By the Acting Chief, Common Carrier Bureau:

1. GTE Service Corporation (GTE) and the Rural Cellular Association (RCA), separately, filed motions for extension of time to comment on the Notice of Proposed Rulemaking and Notice of Inquiry (NPRM) released by the Commission, in the above-captioned proceeding, on July 1, 1994. Comments are currently due August 30, 1994 and reply comments on September 29, 1994.

2. GTE and RCA each request a thirty-day extension in which to provide their comments to the Commission. GTE states that its cellular subsidiaries form the second largest cellular company in the United States. It believes that it can provide a valuable perspective through its comments. It argues, however, that comments of the depth and specificity expected by the Commission on such an extensive list of issues, issues it believes will have an enormous impact on the cellular industry, will necessitate more time than currently provided by the comment period. RCA argues in addition, that, scheduling problems require it to seek an extension of time.

3. We have reviewed GTE and RCA's requests for extension of time and have determined that good cause has been shown to grant GTE and RCA additional time, until **September 12, 1994**, for comments and **October 13, 1994**,, for replies.

4. IT IS THEREFORE ORDERED, that GTE and RCA's motions for extension of time IS GRANTED, to the extent specified herein.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief,
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ORION SATELLITE CORPORATION — File No. CSS-94-010

Application for modification of authorization to construct, launch and operate an international communications satellite system consistent with current separate systems policies

ORDER AND AUTHORIZATION

Adopted: August 1, 1994; Released: August 18, 1994

By the Acting Chief, Common Carrier Bureau:

1. The Commission has under consideration the above-captioned uncontested application filed by Orion Satellite Corporation (Orion) requesting authority to modify its license to construct, launch and operate an international communications satellite system (File No. CSS-83-002-P-(M)) in accordance with recent Commission decisions relaxing restrictions on U.S. separate satellite systems.

I. BACKGROUND

2. The Commission's establishment of separate international satellite systems was based on a 1984 Presidential Determination "that separate international communications satellite systems are required in the national interest."[1] The Presidential Determination directed the Secretaries of State and Commerce to jointly inform the Commission of the criteria necessary to ensure that the United States meets its international obligations and furthers its telecommunications and foreign policy interests. In a letter dated November 28, 1984 the Secretaries of State and Commerce jointly carried out that Presidential directive by advising the Commission of the criteria necessary to ensure fulfillment of U.S. international obligations and furtherance of its telecommunications and foreign policy interests.[2] The letter also specified conditions the Commission should impose on the final authorization of separate systems. Foremost among these conditions was the requirement that separate systems provide communications "not interconnected to the public switched message networks (except for emergency restoration services)."

3. In 1985, the Commission conditionally authorized several applicants, including Orion, to establish separate satellite systems to provide international public telecommunications services in limited competition with INTELSAT, subject to the restriction that such communications not be interconnected with the public switched message network (PSN).[3] At the time, the restriction on interconnection with the PSN was deemed necessary to protect the core revenue base of INTELSAT which consisted of switched services, including switched voice.

4. Since the establishment of international separate satellite systems, INTELSAT has continued to evaluate the risk of economic harm posed by separate systems and has indicated that the provision of a limited amount of switched services by separate systems would not cause it significant economic harm. Consistent with INTELSAT's conclusions, the Departments of State and Commerce subsequently revised their recommended criteria for authorizing separate satellite systems. The modified policy permits a phased relaxation of the restrictions against interconnection with the PSN with a goal of complete elimination of all interconnection restrictions by January 1997.[4] In a series of decisions, the Commission implemented the Executive Branch's suggested modifications to separate systems policy. Specifically, these decisions further relaxed restrictions on international separate satellite systems by permitting private line circuits to be interconnected to the PSN and by increasing the number of circuits that could be interconnected to the PSN for the provision of international switched services to the current level of 1,250 64-kbps equivalent circuits.[5]

II. CONCLUSION AND ORDERING CLAUSES

5. Upon consideration of Orion's request, we find that a modification of its license to construct, launch and operate an international communications satellite system, consistent with the terms and conditions imposed on similar authorizations by Commission orders, will serve the public interest, convenience and necessity.[6] The Commission has previously modified the space station licenses of Pan American Satellite (PAS) and Columbia Communications

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[1] Presidential Determination No. 85-2 (Nov. 28, 1984), 49 Fed. Reg. 46,987.

[2] Letter from George P. Shultz, Secretary of State, and Malcolm Baldridge, Secretary of Commerce, to FCC Chairman Mark S. Fowler (Nov. 28, 1984).

[3] Establishment of Satellite Systems Providing International Communications, 101 FCC 2d 1046 (1985).

[4] Letter dated November 27, 1991 from James Baker, Secretary of State and Robert Mosbacher, Secretary of Commerce to FCC Chairman Alfred C. Sikes (informing the Commission that interconnection of private lines to the PSN for customer use would be consistent with U.S. international obligations and in furtherance of U.S. telecommunications and foreign policy interests); Letter dated January 8, 1993 from Bradley P. Holmes, United States Coordinator for International Communications and Information Policy, Department of State and Gregory L. Chapados, Assistant Secretary for Communications and Information, Department of Commerce to FCC Chairman Alfred C. Sikes (informing the Commission that interconnection of up to 1,250 64-kbps equivalent circuits per satellite to the PSN for switched services would be consistent with U.S. international obligations and in furtherance of U.S. telecommunications and foreign policy interests).

[5] *See* Permissible Services of U.S. Licensed International Communications Satellite Systems Separate from the International Telecommunications Satellite Organization (INTELSAT), 7 FCC Rcd 2313 (1992), *further modification*, 9 FCC Rcd 347 (1994); Alpha Lyracom d/b/a Pan American Satellite, et al., 9 FCC Rcd 1282 (1994) (*PAS Modification Order*).

[6] 47 U.S.C. § 309.

Corporation (Columbia) consistent with the aforementioned modifications of separate systems policy.[7] Grant of the requested modification of Orion's license to operate a separate system will provide users with a wider range of choices in the provision of international satellite services and should exert a downward pressure on rates.

6. Accordingly, IT IS ORDERED that Orion's application to modify its license to construct, launch and operate an international communications satellite system (File No. CSS-83-002-P-(M)) IS GRANTED and Orion is authorized to provide over its separate satellite system: all services not interconnected with the PSN (including private line services and video and audio transmission services); up to 1,250 64-kbps equivalent circuits per satellite interconnected with the PSN for the provision of international switched services; emergency restoration services; and private line services interconnected with the PSN.

7. IT IS FURTHER ORDERED that interconnected private line service is defined as "making dedicated international telecommunications circuits available to a customer for that customer's use; provided that when such service is interconnected with the PSN, persons other than the customer cannot use the circuits to access the general public."

8. IT IS FURTHER ORDERED that any common carrier that seeks to use Orion's system for the provision of common carrier services not previously authorized must file a new Section 214 application.

9. IT IS FURTHER ORDERED that all common carriers providing private line service via facilities obtained from Orion's separate satellite system or any other separate satellite system shall amend their private line tariffs to prohibit the resale of such private lines for the provision of public switched services. Common carriers seeking to use Orion's separate satellite system facilities should file these tariff revisions within sixty days of the release date of this order to become effective on thirty-five days notice.

10. IT IS FURTHER ORDERED that Orion must file with the Commission, within thirty (30) days of execution, any arrangement, agreement or contract with an end user for the interconnection of private lines to the public switched network at a carrier's premises, including only the information contained in such arrangements, agreements or contracts pertaining to the number and type of private line circuits involved, the country of origin, and the duration of the agreement.

11. IT IS FURTHER ORDERED that this authorization is subject to the same terms and conditions set forth in the *PAS Modification* order.

12. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief, Common Carrier Bureau

[7] PAS Modification Order, 9 FCC Rcd 1282 (1994); Columbia Communications Corporation, 7 FCC Rcd 6616 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NYNEX Telephone Companies — Transmittal No. 308

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: August 11, 1994; Released: August 12, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On June 24, 1994, the NYNEX Telephone Companies (NYNEX) filed Transmittal No. 308 to introduce NYNEX Enterprise Synchronous Optical Network (SONET) Private Network Service. According to NYNEX, this service offers synchronous transmission of data at high speed rates among the customer's designated premises or between the customer's designated premises and NYNEX's central office. Transmittal 308 is scheduled to take effect on August 15, 1994.

2. NYNEX states that the proposed offering will allow customers to design their own network utilizing SONET ring architecture and NYNEX's physical facilities, engineering and operations expertise. According to NYNEX, the ring architecture provides for automatic protection against service failure by providing a duplicate facility and redundant equipment.[1]

3. Sonet Private Network Service consists of, among other things, central office nodes,[2] premises nodes, premises ports,[3] and SONET distribution channels. According to the tariff, the customer-designed network "must consist of at least 2 Telephone Company nodes."[4] In addition, the customer may choose to provide its own premises node. In this instance, the node must conform to Bell Communications Research technical standards.

4. The Independent Data Communications Manufacturers Association (IDCMA) filed a petition to reject or suspend and investigate Transmittal 308, and NYNEX filed a reply. IDCMA asserts that Transmittal 308 should be rejected because it includes two provisions that violate the Commission's antibundling rule.[5] IDCMA Petition at 2-3. First, it notes that the tariff provides that nodes on the customer premises can either be provided by the customer on a competitive basis or by the carrier under tariff. IDCMA argues that the option that allows NYNEX to provide customer premises equipment and charge for the equipment under tariff violates Section 64.702(e) of the Commission's rules. *Id.* at 3.

5. Second, with respect to the tariff provision that "service must consist of at least 2 Telephone Company Nodes," IDCMA states that it is unclear whether this language refers to carrier-provided nodes that will be located in the central office or carrier-provided nodes that will be located on the customer's premises. It argues that if NYNEX requires customers to purchase two carrier-provided central office nodes, the tariff should indicate the reasons for such restrictions and should note that the two required nodes are located in the central office and not at the customers' premises. On the other hand, IDCMA argues that if NYNEX is seeking to require customers to purchase one or two customer premises nodesfrom the carrier, the tariff violates the unbundling rule. *Id.* at 3-4.

6. In response, NYNEX asserts that it will not be providing customer's premises equipment. Rather, the equipment provided under tariff will be located in common space at the customer's designated premises. It states that the Commission has held that the location of carrier provided equipment in such common space does not violate the Commission's unbundling rule. NYNEX Reply at 2, citing *NYNEX Telephone Companies, Tariff F.C.C. No. 1*, 8 FCC Rcd 7684, 7689 (1993).

7. With respect to IDCMA's concern that SONET Private Network Service will consist of at least two NYNEX-provided nodes, NYNEX contends that IDCMA has failed to show why this is unlawful. NYNEX points out that neither of these NYNEX-provided nodes will be located on the customer's premises.[6] Therefore, it argues that provision of these nodes does not violate the Commission antibundling rule.

8. The Tariff Division has reviewed the tariff filed by NYNEX, the revisions, IDCMA's petition to reject or suspend and investigate, and NYNEX's reply. Based on these filings, we conclude that no argument has been presented that this tariff is patently unlawful so as to warrant rejection or that an investigation is warranted at this time.

9. Accordingly, IT IS ORDERED that the petition to reject or to suspend and investigate NYNEX Tariff F.C.C. No. 1, Transmittal No. 308, filed by the Independent Communications Manufacturers Association, Inc., IS DENIED.

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[1] NYNEX Transmittal No. 308, Discription and Justification (D&J) at 5.

[2] NYNEX defines a node as a location that has "add/drop multiplexing" capability. The node may be located either in a common space at the customer's premises or in a NYNEX wire center. The add/drop multiplexer allows a customer to add or drop lower level services from a carrier channel. It also controls the operation of the ring protection features.

[3] A premises port is the point at which a customer's channel is connected to customer premises equipment.

[4] NYNEX Tariff F.C.C. No. 1 Section 26.1(A) 1st Revised Page 26.1.

[5] Section 64.702(e) of the Commission's Rules, 47 C.F.R. Section 64.702(e), prohibits bundling of customer premises equipment with regulated, tariffed, transmission service. Customer premises equipment is equipment located at a subscriber's premises which is connected to a carrier's communication channels(s) at the network interface on that subscriber's premises. Amendment of Section 64.702 of the Commission's Rules (Second Computer Inquiry), Final Decision, 77 FCC 2d 384, 398 n.10 (1980).

[6] On August 9, 1994, NYNEX filed an Application for Special Permission to revise Transmittal No. 308. This application was granted on August 10, 1994, under Special Permission No. 94-928. These revisions, among other things, clarify that the telephone company provided node at the customer premises will be located in a common space and will be under telephone company control.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Seabreeze Parasail
Honolulu, HI

NAL/Acct. No. 215HL0007

ORDER

Adopted: August 11, 1994; Released: August 12, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted June 1, 1994, DA 94-573, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $2,000 to Seabreeze Parasail. The Petition for Reconsideration affirmed the NOF. This monetary forfeiture was issued for violation of Section 301 of the Act, 47 U.S.C. §301.

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the June 1, 1994, Order issued to Seabreeze Parasail. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the June 1, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of two thousand dollars ($2,000) against Seabreeze Parasail for violation of Section 301 of the Act, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Maritime Radio Station WAP8267 — NAL/Acct. No. 315PS0001

Hugh Mac Towing Corporation
Kenner, Louisiana

ORDER

Adopted: August 11, 1994; Released: August 12, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted June 1, 1994, DA 94-574, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $12,000 to Hugh Mac Towing Corporation. The Petition for Reconsideration reduced the NOF to $6,400. This monetary forfeiture was issued for violation of Section 301 of the Act, 47 U.S.C. §301 and Section 1.89 of the Commission's Rules, 47 C.F.R. §1.89.

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the June 1, 1994, Order issued to Hugh Mac Towing Corporation. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the June 1, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of six thousand four hundred dollars ($6,400) against Hugh Mac Towing Corporation for violation of Section 301 of the Act and Section 1.89 of the Rules, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ACI Micro, Inc. NAL/Acct. No. 215DV0070
Colorado Springs, CO

ORDER

Adopted: August 11, 1994; Released: August 12, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted June 1, 1994, DA 94-575, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $10,000 to ACI Micro. The Petition for Reconsideration affirmed the NOF. This monetary forfeiture was issued for violation of Section 302(b) of the Act, 47 U.S.C. §302(b) and Section 2.803 of the Commission's Rules, 47 C.F.R. §2.803.

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the June 1, 1994, Order issued to ACI Micro. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the June 1, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of ten thousand dollars ($10,000) against ACI Micro for violation of Section 302(b) of the Act and Section 2.803 of the Rules, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Esaw Industries, Inc. NAL/Acct. No. 215CG0059
East Brunswick, NJ

ORDER

Adopted: August 11, 1994; Released: August 12, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted May 25, 1994, DA 94-569, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $5,600 to Esaw Industries, Inc. The Petition for Reconsideration affirmed the NOF. This monetary forfeiture was issued for violation of Section 302(b) of the Act, 47 U.S.C. §302(b) and Section 2.803 of the Commission's Rules, 47 C.F.R. §2.803.

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the May 25, 1994, Order issued to Esaw Industries, Inc. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the May 25, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of five thousand six hundred dollars ($5,600) against Esaw Industries, Inc. for violation of Section 302(b) of the Act and Section 2.803 of the Rules, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Gary H. Anderson NAL/Acct. No. 315AN0013
Chignik Lagoon, Alaska

ORDER

Adopted: August 11, 1994; Released: August 12, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted May 24, 1994, DA 94-571, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $2,000 to Gary H. Anderson. The Petition for Reconsideration reduced the amount to $1,600. This monetary forfeiture was issued for violation of Section 301 of the Act.

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the May 24, 1994, Order issued to Gary Anderson. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the May 24, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of one thousand six hundred dollars ($1,600) against Gary Anderson for violation of Section 301 of the Act, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mary McClure NAL/Acct. No. 215FE0215
Kingston, Washington

ORDER

Adopted: August 11, 1994; Released: August 12, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted May 24, 1994, DA 94-568, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $200 to Mary McClure. The Petition for Reconsideration affirmed the NOF. This monetary forfeiture was issued for violation of Section 301 of the Act.

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the May 24, 1994, Order issued to Mary McClure. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the May 24, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of two hundred dollars ($200) against Mary McClure for violation of Section 301 of the Act, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Michael McDonald NAL/Acct. No. 215FE0147
Woodinville, Washington

ORDER

Adopted: August 11, 1994; Released: August 12, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted May 24, 1994, DA 94-570, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $500 to Michael McDonald. The Petition for Reconsideration reduced the amount to $100. This monetary forfeiture was issued for violation of Section 301 of the Act.

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the May 24, 1994, Order issued to Michael McDonald. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the May 24, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of one hundred dollars ($100) against Michael McDonald for violation of Section 301 of the Act, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WARNER CABLE
COMMUNICATIONS, INC.

Petition for Stay of Local
Rate Order of City of
Wadsworth, OH

ORDER

Adopted: August 8, 1994; Released: August 9, 1994

By the Acting Chief, Cable Services Bureau:

1. Warner Cable Communications, Inc. ("Warner") filed on April 20, 1994 a Petition for a Stay of Enforcement Pending Review of the local rate order adopted by the City of Wadsworth, Ohio ("City") on March 25, 1994. The local rate order establishes a new schedule of basic service and equipment rates and directs Warner to issue refunds, dating back to September 1, 1993, to subscribers for charges in excess of the newly established rates. The main issue raised by Warner in its petition centers on the regulatory treatment of Warner's a la carte offerings.[1]

2. In a previous *Order*[2] regarding this case, the Commission stayed for forty five (45) days the local rate order adopted by the City pending the resolution of the Letters of Inquiry ("Letters of Inquiry") issued by the Commission with respect to the regulatory treatment of a la carte offerings. In a subsequent *Order*,[3] the Commission extended the period of the stay by an additional forty five (45) days, effective July 1, 1994. While a Letter of Inquiry has not been issued in this case, we granted the previous stay and extension in order to minimize subscriber confusion and ensure regulatory consistency in this important area. The Commission has not yet ruled on the Letters of Inquiry. Therefore, on its own motion, the Commission will now extend the stay previously granted to the earlier of a date ten (10) days after the release of an Order or Orders by the Commission finally resolving the issues raised in the Letters of Inquiry or the resolution of the instant appeal.

3. During the period of this stay, Warner is ordered to continue, as it volunteered to do in its petition for stay, to deposit in an interest-bearing escrow account the total amount of money that the City has ordered Warner to refund to its customers and to deposit on a going-forward basis in that account the difference between the rates Warner actually charges its customers and the rates that the City has set for Warner's basic service and equipment in its local rate order.

4. In several recent orders in which we granted stay requests under similar circumstances, we have required operators to notify subscribers of the possibility of their receiving refunds and to advise subscribers who may be planning to relocate outside of the franchise area to provide the operator with a forwarding address to which refunds may be delivered.[4] In this case and in other similar cases on a going-forward basis, we will no longer require operators to notify and track subscribers. This requirement is unnecessary since the Commission's rules give the operator the option of implementing a refund by either returning overcharges to those subscribers who actually paid the overcharges or by issuing a specifically-identified, one-time credit on prospective bills to current subscribers.[5]

5. Accordingly, IT IS ORDERED that the STAY granted by the Commission regarding the local rate order adopted by the City of Wadsworth, Ohio establishing rates for Warner Cable Communications, Inc.'s basic service tier and associated equipment is EXTENDED until the earlier of a date ten (10) days after the release of an Order or Orders by the Commission finally resolving the issues raised in the Letters of Inquiry or the resolution of the instant appeal. This action is taken by the Acting Chief, Cable Services Bureau, pursuant to authoritydelegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

[1] A la carte offerings include channels that can be subscribed to individually or as part of a package.
[2] *Order* (Petition for Stay of Local Rate Order of City of Wadsworth, OH), DA 94-511 (Rel. May 17, 1994).
[3] *Order* (Petition for Stay of Local Rate Order of City of Wadsworth, OH), DA 94-727 (Rel. June 29, 1994).
[4] See, e.g., *Warner Southwest Television Corp.*, DA 94-463 (Rel. May 9, 1994); and *SBC Media Ventures, Inc.*, DA 94-702 (Rel. June 23, 1994).
[5] See 47 C.F.R. §76.942(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CENTURY CABLE
OF SOUTHERN CALIFORNIA

Petition for Stay of Local
Rate Order of City of
La Habra, CA

ORDER

Adopted: August 8, 1994; Released: August 9, 1994

By the Acting Chief, Cable Services Bureau:

1. Century Cable of Southern California ("Century") filed on April 28, 1994 an Emergency Petition for a Stay of Enforcement Pending Review of the local rate order adopted by the City of La Habra, California ("City") on March 28, 1994. The local rate order establishes a new schedule of basic service and equipment rates and directs Century to issue refunds, dating back to September 1, 1993, to subscribers for charges in excess of the newly established rates. The main issue raised by Century in its petition centers on the regulatory treatment of Century's a la carte offerings.[1]

2. In a previous *Order*[2] regarding this case, the Commission stayed for forty five (45) days the local rate order adopted by the City pending the resolution of the Letters of Inquiry ("Letters of Inquiry") issued by the Commission with respect to the regulatory treatment of a la carte offerings. In a subsequent *Order*,[3] the Commission extended the period of the stay by an additional forty five (45) days, effective July 1, 1994. While a Letter of Inquiry has not been issued in this case, we granted the previous stay and extension in order to minimize subscriber confusion and ensure regulatory consistency in this important area. The Commission has not yet ruled on the Letters of Inquiry. Therefore, on its own motion, the Commission will now extend the stay previously granted to the earlier of a date ten (10) days after the release of an Order or Orders by the Commission finally resolving the issues raised in the Letters of Inquiry or the resolution of the instant appeal.

3. During the period of this stay, Century is ordered to continue, as it volunteered to do in its petition for stay, to deposit in an interest-bearing escrow account the total amount of money that the City has ordered Century to refund to its customers and to deposit on a going-forward basis in that account the difference between the rates Century actually charges its customers and the rates that the City has set for Century's basic service and equipment in its local rate order.

4. In several recent orders in which we granted stay requests under similar circumstances, we have required operators to notify subscribers of the possibility of their receiving refunds and to advise subscribers who may be planning to relocate outside of the franchise area to provide the operator with a forwarding address to which refunds may be delivered.[4] In this case and in other similar cases on a going-forward basis, we will no longer require operators to notify and track subscribers. This requirement is unnecessary since the Commission's rules give the operator the option of implementing a refund by either returning overcharges to those subscribers who actually paid the overcharges or by issuing a specifically-identified, one-time credit on prospective bills to current subscribers.[5]

5. Accordingly, IT IS ORDERED that the STAY granted by the Commission regarding the local rate order adopted by the City of La Habra, California establishing rates for Century Cable of Southern California's basic service tier and associated equipment is EXTENDED until the earlier of a date ten (10) days after the release of an Order or Orders by the Commission finally resolving the issues raised in the Letters of Inquiry or the resolution of the instant appeal. This action is taken by the Acting Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

[1] A la carte offerings include channels that can be subscribed to individually or as part of a package.
[2] *Order* (Petition for Stay of Local Rate Order of City of La Habra, CA), DA 94-513 (Rel. May 17, 1994).
[3] *Order* (Petition for Stay of Local Rate Order of City of La Habra, CA), DA 94-728 (Rel. June 29, 1994).
[4] See, e.g., *Century Southwest Television Corp.*, DA 94-463 (Rel. May 9, 1994); and *SBC Media Ventures, Inc.*, DA 94-702 (Rel. June 23, 1994).
[5] See 47 C.F.R. §76.942(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CENTURY CABLE
OF SOUTHERN CALIFORNIA

Petition for Stay of Local
Rate Order of City of
Brea, CA

ORDER

Adopted: August 8, 1994; Released: August 9, 1994

By the Acting Chief, Cable Services Bureau:

1. Century Cable of Southern California ("Century") filed on April 28, 1994 an Emergency Petition for a Stay of Enforcement Pending Review of the local rate order adopted by the City of Brea, California ("City") on March 24, 1994. The local rate order establishes a new schedule of basic service and equipment rates and directs Century to issue refunds, dating back to September 1, 1993, to subscribers for charges in excess of the newly established rates. The main issue raised by Century in its petition centers on the regulatory treatment of Century's a la carte offerings.[1]

2. In a previous *Order*[2] regarding this case, the Commission stayed for forty five (45) days the local rate order adopted by the City pending the resolution of the Letters of Inquiry ("Letters of Inquiry") issued by the Commission with respect to the regulatory treatment of a la carte offerings. In a subsequent *Order*,[3] the Commission extended the period of the stay by an additional forty five (45) days, effective July 1, 1994. While a Letter of Inquiry has not been issued in this case, we granted the previous stay and extension in order to minimize subscriber confusion and ensure regulatory consistency in this important area. The Commission has not yet ruled on the Letters of Inquiry. Therefore, on its own motion, the Commission will now extend the stay previously granted to the earlier of a date ten (10) days after the release of an Order or Orders by the Commission finally resolving the issues raised in the Letters of Inquiry or the resolution of the instant appeal.

3. During the period of this stay, Century is ordered to continue, as it volunteered to do in its petition for stay, to deposit in an interest-bearing escrow account the total amount of money that the City has ordered Century to refund to its customers and to deposit on a going-forward basis in that account the difference between the rates Century actually charges its customers and the rates that the City has set for Century's basic service and equipment in its local rate order.

4. In several recent orders in which we granted stay requests under similar circumstances, we have required operators to notify subscribers of the possibility of their receiving refunds and to advise subscribers who may be planning to relocate outside of the franchise area to provide the operator with a forwarding address to which refunds may be delivered.[4] In this case and in other similar cases on a going-forward basis, we will no longer require operators to notify and track subscribers. This requirement is unnecessary since the Commission's rules give the operator the option of implementing a refund by either returning overcharges to those subscribers who actually paid the overcharges or by issuing a specifically-identified, one-time credit on prospective bills to current subscribers.[5]

5. Accordingly, IT IS ORDERED that the STAY granted by the Commission regarding the local rate order adopted by the City of Brea, California establishing rates for Century Cable of Southern California's basic service tier and associated equipment is EXTENDED until the earlier of a date ten (10) days after the release of an Order or Orders by the Commission finally resolving the issues raised in the Letters of Inquiry or the resolution of the instant appeal. This action is taken by the Acting Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

[1] A la carte offerings include channels that can be subscribed to individually or as part of a package.
[2] *Order* (Petition for Stay of Local Rate Order of City of Brea, CA), DA 94-512 (Rel. May 17, 1994).
[3] *Order* (Petition for Stay of Local Rate Order of City of Brea, CA), DA 94-729 (Rel. June 29, 1994).
[4] See, e.g., *Century Southwest Television Corp.*, DA 94-463 (Rel. May 9, 1994); and *SBC Media Ventures, Inc.*, DA 94-702 (Rel. June 23, 1994).
[5] See 47 C.F.R. §76.942(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PARAGON CABLE

Request for Stay
of Local Rate Order of the
Consolidated Cable
Communications Commission
for Portland, Multnomah County, and
Linton, Oregon Franchise Areas

ORDER

Adopted: August 8, 1994; Released: August 9, 1994

By the Acting Chief, Cable Services Bureau:

1. Paragon Cable ("Paragon"), the franchisee in the above matter, filed on July 13, 1994 a Request for Emergency Stay of the local rate order adopted March 14, 1994 by its franchising authority,[1] the Consolidated Cable Communications Commission ("CCCC").[2] On July 27, the CCCC filed a Reply to Paragon's Request for Emergency Stay, urging the Commission to reject Paragon's petition.

2. In its local rate order, the CCCC established regulated rates for Paragon's basic cable service and associated equipment and installation charges, as provided by the Cable Television Consumer Protection and Competition Act of 1992.[3] The CCCC accepted the basic service rate proposed by Paragon. The CCCC also accepted those equipment and installation charges which were below Paragon's maximum permitted rate,[4] but ordered reductions in the rates Paragon charges for addressable converters, manual converters, remotes, and changes of service. Paragon was ordered to refund to subscribers those equipment and installation charges since September 1, 1993 which were in excess of its maximum permitted rates. This refund liability, Paragon argues, is in excess of permitted levels.

3. Paragon seeks an emergency stay of the local rate order pending Commission resolution of its appeal on the merits. The CCCC has not submitted any papers in opposition to Paragon's Emergency Request for Stay.

4. The Commission evaluates petitions for stay under well settled principles. To support a stay, petitioners must demonstrate: (1) that they are likely to prevail on the merits; (2) that they will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors the granting of a stay.[5] As discussed below, resolution of this stay petition centers primarily on the strength of petitioner's argument regarding the first prong of this test.

5. We believe the Commission should not conduct de novo review of local rate decisions and that the standard of review should be whether there is a reasonable basis for the franchising authority's decision.[6] The Commission will defer to the judgment of the local franchising authority provided that there is a rational basis for the decision.[7]

6. However, as we explained in *TCI Cablevision of St. Louis, Inc.*, DA 94-424 (Rel. April 29, 1994); and *Sammons Communications, Inc.*, DA 94-515 (Rel. May 23, 1994), if a franchising authority approves the cable operator's proposed rates for basic cable service while reducing permitted equipment rates, without allowing an offsetting increase in the tier charge for basic service, the franchising authority is requiring refunds of liability in excess of maximum levels permitted by Commission regulations. We emphasized our expectation that franchising authorities adhere strictly to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.[8] However, because Paragon's submission appears to show that a misapplication of our rules may have occurred, and because the CCCC has not filed any opposition, we grant Paragon's Request for Emergency Stay, pending full review of this case on the merits.

7. In order to protect the interests of subscribers, we will require Paragon to place in an interest-bearing escrow account the sum the CCCC has ordered to be refunded, and accumulate in the escrow account the difference between the rates ordered by the CCCC and the prices charged by Paragon as subscriber fees are collected during the period of the stay. Paragon must furnish the Commission with documentation demonstrating its compliance with this Order within thirty (30) days of the release of this Order. Paragon argues that it should not have to establish an escrow account since there is no real risk of later default. However, while an appeal is pending, it serves the public interest to safeguard the rights of subscribers to refunds which have been ordered by the local franchising authority. Therefore, the establishment of such an escrow account is a condition of our granting this Order.

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[1] Paragon filed an Appeal of Local Cable Rate Order of the Consolidated Cable Communications Commission on April 13, 1994.

[2] Effective July 1, 1994, the Consolidated Cable Communications Commission changed its name to the Mt. Hood Cable Regulatory Commission ("MHCRC"). For clarity's sake, the MHCRC will be referred to throughout this Order as the CCCC.

[3] Pub. L. No. 1002-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[4] In order to determine its maximum permitted rate for regulated service and equipment, Paragon submitted its initial FCC Form 393 ("Determination of Maximum Initial Permitted Rates for Regulated Cable Programming Services and Equipment") to the CCCC on November 15, 1993. Subsequently, Paragon submitted two (2) revised FCC Form 393s, one on January 7, 1994 and one on February 13, 1994.

[5] See *Wisconsin Gas Co. v. FERC*, 758 F. 2d 669, 673-74 (D.C. Cir. 1985) (per curiam); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

[6] *Report and Order and Further Notice of Proposed Rulemaking* in MM Docket 92-266, 8 FCC Rcd 5631, at para. 149 (Rel. May 3, 1993).

[7] *Id.*

[8] *TCI Cablevision of St. Louis, Inc.* at para. 7; and *Sammons Communications, Inc.* at para. 5.

8. Paragon also argues that it should not be required to notify all subscribers of the potential refund and should not be required to maintain subscriber lists and forwarding addresses of subscribers who move out of the area. We will not require Paragon to do so. In several recent orders in which we granted stay requests under similar circumstances, we have required operators to notify subscribers of the possibility of their receiving refunds and to advise subscribers who may be planning to relocate outside of the franchise area to provide the operator with a forwarding address to which refunds may be delivered.[9] In every such case, the operator either volunteered to so notify subscribers or did not oppose the requirement. Here, Paragon states that, in the event that it loses its appeal and is required to issue refunds, it will elect to issue refunds to existing, rather than past, subscribers.[10] The Commission's rules give the operator the option of determining the methodology of implementing a refund.[11] Paragon, by stating its intention to make any refund payments to existing subscribers, makes a requirement to notify and track subscribers unnecessary.[12]

9. Accordingly, IT IS ORDERED, pursuant to §1.45(e) of the Commission's rules (47 C.F.R. §1.45 (e)), that the local rate order adopted by the Consolidated Cable Communications Commission is STAYED pending our resolution of this appeal. This action is taken by the Acting Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's rules (47 C.F.R. §0.321).

10. IT IS FURTHER ORDERED that the amount of the refunds required in the Consolidated Cable Communications Commission's local rate order, and the amount of the difference between rates ordered by the Consolidated Cable Communications Commission and the subscriber fees collected during the period of the stay, SHALL BE PLACED by Paragon in an interest-bearing escrow account, and that proof of this shall be filed with the Commission within thirty (30) days of the release of this order. Interest shall accrue at the prevailing U.S. Internal Revenue Service Rate.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

[9] See, e.g., *Century Southwest Television Corp.*, DA 94-463 (Rel. May 9, 1994); and *SBC Media Ventures, Inc.*, DA 94-702 (Rel. June 23, 1994).

[10] See Request for Emergency Stay at 8.

[11] See 47 C.F.R. §76.942(d).

[12] As noted in paragraph 7 above, the need to protect subscribers' interests in potential refunds remains. Under our rules, as noted *supra* note 11, cable operators have the option of determining both the class of subscribers who will receive refunds and the method of disbursement of those refunds. Even if an operator were to choose to refund overcharges to subscribers through specifically identified, one-time credits on bills, rather than issuing actual refunds, the need to protect subscribers' interests in these monies continues. Hence, although Paragon will not be required to either notify subscribers of the potential refund or maintain subscriber lists and forwarding addresses of subscribers who move out of the area, the necessity of Paragon's establishing an escrow account, as detailed above, remains.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLEVISION INDUSTRIES CORPORATION

Appeal From a Rate Decision and Order of the City of Columbia, South Carolina

Request for Stay of Local Rate Order of the City of Columbia, South Carolina

ORDER

Adopted: August 8, 1994; Released: August 9, 1994

By the Acting Chief, Cable Services Bureau:

1. On May 13, 1994, Cablevision Industries Corporation ("CVI"), franchisee in the above referenced proceeding, filed an Appeal of the local rate order of the city of Columbia, South Carolina ("Columbia") and a Request for Stay of that order pending review on appeal. For the reasons stated below, both the Appeal and the Request for Stay are dismissed.

2. Columbia, the franchising authority in this instance, adopted the local rate order in question, known as Resolution R94-007, on February 2, 1994.[1] A copy of the rate order was mailed to CVI by certified mail on February 4, 1994. CVI signed for this copy of the rate order on February 7, 1994.

3. Under the Commission's rules, any participant in a ratemaking proceeding at the franchising authority level may file an appeal of the franchising authority's decision with the Commission within 30 days of the release of the text of the franchising authority's decision.[2] The latest possible date that could be assigned to the release of the franchising authority's decision is February 7, 1994, the day CVI signed for a copy of the order. Therefore, CVI's Appeal of the rate order would have been due no later than March 9, 1994, which was 30 days after February 7, 1994. The Appeal was received by the Commission on May 13, 1994, more than 60 days late. The Appeal is therefore untimely and is dismissed.

4. In light of the dismissal of its Appeal, CVI's Request for Stay pending review on appeal is rendered moot and is dismissed as well.

5. Accordingly, IT IS ORDERED that the Appeal of Cablevision Industries Corporation From a Rate Decision and Order of the City of Columbia, South Carolina, dated May 13, 1994 is DISMISSED.

6. IT IS FURTHER ORDERED that the Request of Cablevision Industries Corporation for Stay of a Rate Order of the City of Columbia, South Carolina, dated May 13, 1994 is DISMISSED.

7. This action is taken by the Acting Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

[1] Under the Cable Television Consumer Protection and Competition Act of 1992, and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. See Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[2] See 47 C.F.R. § 76.944(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Petition for Reconsideration

C-TEC CABLE SYSTEMS OF MICHIGAN INC.

of Certification of
Benzonia Township, Michigan
to Regulate Basic Cable Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: August 8, 1994; Released: August 9, 1994

By the Chief, Cable Services Bureau:

1. On October 29, 1993, C-Tec Cable Systems of Michigan, Inc. ("C-Tec") filed a petition for reconsideration challenging the certification of the Benzonia Township ("Benzonia") to regulate rates for basic cable service and associated equipment in the franchise area designated as FCC Community ID No. MI0620. Benzonia did not file an opposition. On May 26, 1994, C-Tec filed a supplement to its original petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[1] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[2] Such certification becomes effective within 30 days of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[3] Cable operators may file petitions for reconsideration of the franchising authority's certification.[4] Regulation of rates is automatically stayed pending review of a petition for reconsideration alleging effective competition.[5]

3. In its petition, C-Tec originally stated that its system serving Benzonia Township was subject to effective competition because the system served fewer than 30% of the households within its franchise area. Specifically, C-Tec stated that it served 395 of the 1,743 "homes" within the franchise area and, therefore, its system served only 23% of the households within the franchise area.[6] In its supplement, however, C-Tec effectively withdrew its petition, stating that, in light of the Commission's recent clarification of the definition of "households,"[7] it has determined that its penetration level is actually 51%. In light of this information, we find that C-Tec has failed to demonstrate that effective competition exists within its franchise area. Accordingly, we will deny its petition.

ORDERING CLAUSES

4. Accordingly, IT IS ORDERED that the petition for reconsideration filed by C-Tec Cable Systems of Michigan, Inc. challenging the certification of the Township of Benzonia, Michigan to regulate rates IS DENIED.

5. IT IS FURTHER ORDERED that, to the extent that C-Tec has not already done so, it shall file the required rate justifications on the applicable forms with Benzonia Township within thirty (30) days of the release date of this *Memorandum Opinion and Order* or within thirty (30) days of receipt of notice from Benzonia Township that it is regulating C-Tec's rates, whichever is later.

6. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

7. Interested parties may direct any questions to Lisa M. Higginbotham, Cable Services Bureau, Consumer Protection Division, at (202) 416-0851.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

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[1] *See* 47 U.S.C. § 543(a)(4).

[2] *See* 47 C.F.R. §§ 76.906, 76.910(b)(4).

[3] *See* 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer rate regulations; or (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties. *See* 47 U.S.C. § 543(a)(4).

[4] *See* 47 C.F.R. §§ 1.106, 76.911. *See also Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[5] *See* 47 C.F.R. § 76.911(c).

[6] Declaration of Robin R. Troop, Vice President and General Manager, dated October 25, 1993. The "homes" data is based on "housing unit" (occupied and vacant) data found in the 1990 Census. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 CH-1-24, 1990 Census of Housing, General Housing Characteristics, Michigan, Table 1, at 3. *See also* Bureau of the Census, U.S. Dept. of Commerce, 1990 CPH-1-24, 1990 Census of Housing, Summary Population and Housing Characteristics, Michigan, Table 7, at 162.

[7] *See Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 59 FR 17,961 (April 15, 1994) (*"Third Recon. Order"*). In the *Third Recon. Order*, the Commission clarified that the term "households" includes only full-time occupied housing units. *Id.*, at 17,962.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Petition for Reconsideration

C-TEC CABLE SYSTEMS OF MICHIGAN INC.

of Certification of
Oakfield Township, Michigan
to Regulate Basic Cable Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: August 8, 1994; Released: August 9, 1994

By the Chief, Cable Services Bureau:

1. On October 26, 1993, C-Tec Cable Systems of Michigan, Inc. ("C-Tec") filed a petition for reconsideration challenging the certification of the Oakfield Township ("Oakfield") to regulate rates for basic cable service and associated equipment in the franchise area designated as FCC Community ID No. MI0300. On November 16, 1993, Oakfield filed its opposition. On December 7, 1993, C-Tec filed its reply. On May 26, 1994, C-Tec filed a supplement to its original petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[1] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition.[2] Such certification becomes effective within 30 days of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[3] Cable operators may file petitions for reconsideration of the franchising authority's certification.[4] Regulation of rates is automatically stayed pending review of a petition for reconsideration alleging effective competition.[5]

3. In its petition, C-Tec originally stated that its system serving Oakfield Township was subject to effective competition because the system served fewer than 30% of the households within its franchise area. Specifically, C-Tec stated that it served 424 of the 1,531 "homes" within the franchise area and, therefore, its system served only 28% of the households within the franchise area.[6] In its supplement, however, C-Tec effectively withdrew its petition, stating that, in light of the Commission's recent clarification of the definition of "households,"[7] it has determined that its penetration level is 31%.[8] In light of this information, we find that C-Tec has failed to demonstrate that effective competition exists within its franchise area. Accordingly, we deny its petition.

ORDERING CLAUSES

4. Accordingly, IT IS ORDERED that the petition for reconsideration filed by C-Tec Cable Systems of Michigan, Inc. challenging the certification of the Township of Oakfield, Michigan to regulate rates IS DENIED.

5. IT IS FURTHER ORDERED, that to the extent C-Tec has not already done so, it shall file the required rate justifications on the applicable forms with Oakfield Township within thirty (30) days of the release date of this *Memorandum Opinion and Order* or within thirty (30) days of receipt of notice from Oakfield Township that it is regulating C-Tec's rates, whichever is later.

6. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

7. Interested parties may direct any questions to Lisa M. Higginbotham, Cable Services Bureau, Consumer Protection Division, at (202) 416-0851.

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[1] *See* 47 U.S.C. § 543(a)(4).

[2] *See* 47 C.F.R. §§ 76.906, 76.910(b)(4).

[3] *See* 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer rate regulations; or (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties. *See* 47 U.S.C. § 543(a)(4).

[4] *See* 47 C.F.R. §§ 1.106, 76.911. *See also Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[5] *See* 47 C.F.R. § 76.911(c).

[6] Declaration of Robin R. Troop, Vice President and General Manager, dated October 25, 1993. The "homes" data is based on "housing unit" (occupied and vacant) data found in the 1990 Census. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 CH-1-24, 1990 Census of Housing, General Housing Characteristics, Michigan, Table 1, at 6. *See also* Bureau of the Census, U.S. Dept. of Commerce, 1990 CPH-1-24, 1990 Census of Housing, Summary Population and Housing Characteristics, Michigan, Table 7, at 166.

[7] *See Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 59 FR 17,961 (April 15, 1994) (*"Third Recon. Order"*). In the *Third Recon. Order*, the Commission clarified that the term "households" includes only full-time occupied housing units. *Id.*, at 17,962.

[8] In opposition to C-Tec's petition, Oakfield argued that C-Tec had not demonstrated the presence of effective competition because it failed to disclose the number of subscribers served by TCI, another cable system serving Oakfield Township. C-Tec acknowledges that its penetration level exceeds that needed to be deemed subject to effective competition. On that basis, we will deny its petition. However, we remind Oakfield that the Commission has previously stated that, under the first test of effective competition, measurement of subscribership is based on the number of households served by the particular cable system in question and not an aggregation of subscriberships of all cable systems and competitors in the franchise area. *Rate Order*, at 5648.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-3

In the Matter of

Amendment of Section 73.202(b), RM-8384
Table of Allotments.
FM Broadcast Stations.
(Silverton, Colorado)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 12, 1994; Released: August 19, 1994

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 9 FCC Rcd 661 (1994), issued in response to a petition filed by Caren Lacy ("petitioner"), permittee of Station KWXA(FM), Channel 259C2, Durango, Colorado, proposing the substitution of Channel 224A for Channel 257A, vacant and unapplied for at Silverton, Colorado, to accommodate petitioner's construction permit application site for Station KWXA(FM), located on Forest Service land. Additionally, the *Notice* optionally proposed the deletion of Channel 257A at Silverton, without replacement of a substitute Class A channel, in the event applications were not filed for the vacant allotment during the comment period in this proceeding, and if no interest was expressed for proposed Channel 224A. Petitioner filed supporting comments in response to the *Notice*. Comments and a counterproposal were filed on behalf of Beachport Communications, Inc. ("Beachport")[1] [2] Petitioner submitted late filed reply comments.[3]

2. As stated in the *Notice*, based upon a reasonable assurance from the Forest Service of a leased transmitter site, petitioner was granted a construction permit (File No. BPH-910227MG) for Channel 259C2 at coordinates 37-19-59 and 107-19-59. However, the Forest Service subsequently advised petitioner that communications facilities within its confines are restricted to designated electronic sites. Accordingly, the Forest Service designated a specific electronic site at coordinates 37-20-21 and 107-49-25 to accommodate communications installations. However, the Forest Service's specified electronics site is 0.7 kilometers short spaced to Channel 257A at Silverton at coordinates 37-48-18 and 107-38-03. As no other Class C2 channels are available as a substitute for Channel 259C2 at Durango, we believe the public interest would be served by deleting Channel 257A at Silverton, without a replacement, since no applications were filed for the vacant allotment and no interest was expressed for Channel 224A during the comment period in this proceeding. Such action will enable petitioner to provide an expanded FM service to the Durango area, as previously authorized, from the Forest Service's designated electronics site.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 3, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Silverton, Colorado, as follows:

City	Channel No.
Silverton, Colorado	279C2, 297C

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Beachport is an applicant for Channel 224A at Glenwood Springs, Colorado (File No. 940120MA).

[2] Beachport's counterproposal is procedurally defective and therefore was not placed on public notice, as it was not filed in accordance with the requirements of §1.420(e) of the Commission's Rules and paragraph 5 of the Appendix to the *Notice*. In any event, we have reviewed the comments and conclude that even if the required complement of copies had been filed, Beachport's request to upgrade on the co-channel at Glenwood Springs is inappropriate for consideration. Since no authorization has been issued to Beachport to operate on Channel 224A, if a higher class channel were made available at Glenwood Springs, a new filing window would be opened for the acceptance of new applications. *See Brownsville, Newport, Oakridge and Reedsport, Oregon*, 3 FCC Rcd 3968 (1988). We do not believe Beachport intended to jeopardize its standing as the potential permittee for Channel 224A at Glenwood Springs in that manner. Moreover, in the event Beachport is ultimately granted a construction permit on Channel 224A at Glenwood Springs, its desire to upgrade to a higher class on the co-channel must be advanced by means of the one-step application process rather than through a rule making proceeding. *See Report and Order*, MM Docket No. 92-159, 8 FCC Rcd 4735 (1993).

[3] Petitioner's reply comments were not accompanied by a motion to accept. However, since no acceptable conflicting proposal is before us for consideration (see footnote 2, *supra*), we have accepted the reply comments for the limited purpose of accepting petitioner's expression of continuing interest in pursuing the site relocation for Channel 259C2 at Durango, Colorado. In all other respects, petitioner's reply comments are moot, given our resolution of this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Corporate Satellite Communications, Inc. — File No. I-T-C-94-302

Application for Authority to Establish Channels of Communication Between the United States and Various Locations via Its Englewood, New Jersey Earth Station

ORDER AND AUTHORIZATION

Adopted: August 12, 1994; Released: August 19, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by Corporate Satellite Communications, Inc. (CSC) pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-302 IS GRANTED and CSC is authorized to:

a. lease from Comsat and operate satellite facilities listed in Appendix A between its Englewood, New Jersey (KA-80) earth station via an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar facilities between the satellite and the points listed in Appendix A hereto, furnished by CSC's correspondents, for the provision of switched and private line voice and data services;

b. establish up to one 128-Kbps circuit between its Englewood, New Jersey (KA-80) earth station and the PAS-1 satellite for the provision of voice and data service interconnected with the public switched network between the United States and the Russian Federation;

c. establish channels of communication between its Englewood, New Jersey (KA-80) earth station and the PAS-1 satellite for the provision of video transmissions, not interconnected with the public switched network, occupying up to one 36-Mhz transponder (with no more than a total of four 36-Mhz transponders being occupied at the same time)[1] on the PAS-1 satellite between the United States and the points listed in Appendix B for the PAS-1 satellite; and

d. lease and operate any necessary domestic connecting facilities between the Englewood earth station and CSC's operating center.

3. IT IS FURTHER ORDERED that the applicant shall file with the Commission a copy of any operating agreement it enters into with its foreign correspondents within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

4. IT IS FURTHER ORDERED that our authorization for CSC to provide private lines is limited to the provision of such private lines only between the United States and those points listed in Appendix A -- that is, private lines which originate in the United States and terminate in one of the points listed in Appendix A, or which originate in one of the points listed in Appendix A and terminate in the United States. In addition, CSC may not -- and CSC's tariff must state that CSC's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that its correspondents afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further NPRM*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

5. IT IS FURTHER ORDERED that neither CSC nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which CSC or any persons or companies controlling or controlled by CSC are parties.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit addition reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. Section 63.15(b) for additional circuits established via the INTELSAT system.

9. IT IS FURTHER ORDERED that the Commission retains jurisdiction over the allocation of circuits to common carriers over the PAS-1 satellite.

[1] Although CSC requested authority for one 36-Mhz transponder to each location listed in Appendix B, we do not believe that the request is reasonable given the number of countries requested and the limited number of transponders available over the PAS-1 satellite. Should CSC's service requirements exceed the number of transponders authorized herein, CSC may file a new Section 214 application.

10. IT IS FURTHER ORDERED that the applicant shall file an application pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214, before adding any circuits or channels of communication for the provision of service over any separate satellite system.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Country	No. of Circuits	Circuit Size
Brazil	1	64 KBps
Canada	1	2,048 MBps
Chile	3	2,048 MBps
Columbia	1	2,048 MBps
Congo	2	128 KBps
France	1	2,048 KBps
Germany	1	512 KBps
Italy	1	512 KBps
Kuwait	1	2,048 KBps
Lebanon	1	2,048 KBps
Panama	1	2,048 KBps
Saudi Arabia	1	2,048 KBps
Spain	1	2,048 KBps
United Kingdom	1	2,048 KBps
Former USSR	3	2,048 KBps

APPENDIX B

PAS-1 (Service not interconnected with the public switched network)

Anguilla
Argentina
Aruba
Austria
Azerbaijan
Bahamas
Belgium
Bermuda
Bolivia
Brazil
British Virgin Islands
Cayman Islands
Chile
Columbia
Costa Rica
Czech Republic
Denmark
Dominican Republic
Ecuador
France
Germany
Greece
Guatemala
Haiti
Honduras
Ireland
Italy
Jamaica
Luxembourg
Mexico
Monaco
Montserrat
Netherlands
Netherlands Antilles
Panama
Paraguay
Peru
Portugal
Romania
Russian Federation
Spain
Switzerland
Trinidad and Tobago
Turks and Caicos Islands
United Kingdom
Venezuela
Former Yugoslavia

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 15, 1994

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PETITIONS FOR WAIVER OF COMMISSIONACCESS CHARGE RULES TO PROVIDE 500 ACCESS SERVICE

A number of local telephone companies (LECs) have filed requests for waiver of the Commission's existing access charge rules to permit the introduction of new charges for 500 Access Service.

On July 8, 1994, Ameritech petitioned the Commission for a waiver of §69.106 of the Commission Rules to establish new nonrecurring rate elements within Local Switching for the recovery of costs associated with the provision of 500 Access Service. Existing switched access rates would also apply to 500 Access Service. Ameritech states that 500 Access Service is a new service offering that will allow customers to provide services using the 500 service access code. According to Ameritech, 500 Access Service will use the same "NXX Plan" currently used for 900 Access Service, with six-digit screening used to route calls. Ameritech states that the new rate elements will ensure that those costs unique to the service will be borne by the users of that service.

US West filed in support of the Ameritech petition, also requesting that the Commission issue a blanket Part 69 waiver to permit any 500 access provider to propose recurring and/or nonrecurring rate elements for this service and defend their proposed rate structure in the tariff review process.

On August 5, 1994, Southwestern Bell Telephone Company (SWBT) petitioned the Commission for waiver of §69.4(b) of the Commission's Rules to establish a rate element for a new switched access service - Advanced Carrier Identification Service (ACIS). SWBT describes ACIS as an originating trunk side switched access service that will translate a dialed PCS number to determine the access customer to whom a call is to be delivered. SWBT says that the technology used to perform this identification may vary. SWBT states that the waiver will allow it to pass on the cost of identifying the access customer receiving the call to that customer.

On August 10, 1994, Bell Atlantic petitioned the Commission for waiver of §69.4(b) of the Commission's Rules to create a new service element to allow introduction of a new traffic sensitive switched service called 500 Access Service. This offering would perform six digit 500-NXX screening using data base technology in order to identify and route PCS calls to the appropriate service provider. Bell Atlantic proposes a per query charge for this service.

On August 11, 1994, the United Telephone and Central Telephone companies (United and Central) petitioned the Commission for a waiver of the Commission's Part 69 Rules to establish separate rate elements for recovery of the costs incurred in the provision of exchange access for 500 service (Interim 500 Access Service). United and Central state that the new service will allow interexchange carriers to provide services using the 500 service access code to their end users. United and Central state that they will perform six-digit screening on originating 1+ and 0+ calls to determine the customer identification, based on the NXX of the dialed call, and will route calls to the appropriate 500 service provider. They propose the addition of four new non-recurring charges to recover the costs incurred in performing the switch translation changes for this service.

On August 11, 1994, US West Communications (US West) petitioned the Commission for waiver of the Commission's Part 69 Rules to allow it to establish within the local switching category, new rate elements (both recurring and non-recurring) to recover the special costs it will incur in providing 500 Access Service. US West states that it will structure its access tariff so that the incremental costs it incurs in provisioning this new service will be borne only by carriers using 500 access. US West also reiterates its request that the Commission enter a blanket waiver, noting that this would allow other companies to avoid the delays and costs associated with filing individual waiver requests.

On August 12, 1994, BellSouth Telecommunications, Inc. (BellSouth) also petitioned the Commission for waiver of the Commission's Part 69 Rules in order to establish new rate elements for the provision of 500 Access Service. Bellsouth states that the 500 Access Service will enable the access customer to receive originating access calls dialed by the use of a 1+ or 0+ 500-NXX-XXXX number, utilizing the NXX of the number dialed. BellSouth further states that the rate elements will consist of a recurring charge per call plus nonrecurring charges associated with service establishment, changes and rearrangements.

A number of the LECS filing petitions for waiver ask the Commission to act expeditiously so that they can satisfy customer requests for this service.

Interested parties may file comments on these petitions for waiver as well as the US West waiver proposal by **August 30, 1994**, and reply comments by **September 9, 1994**, with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of these filings can be obtained from ITS, Inc. at (202) 857-3800.

We will treat these proceedings as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MOBILCOM PITTSBURG, INC.

Application for renewal of
trunked SMR station WNGC453

ORDER

Adopted: August 11, 1994; Released: August 19, 1994

By the Commission:

1. In *Memorandum Opinion and Order*, 8 FCC Rcd 351 (1993), we affirmed staff action that (1) enforced the loading requirement set forth in Section 90.631(b) of our rules, 47 C.F.R. § 90.631(b), with respect to Station WNGC453 and (2) renewed two of the five channels initially licensed to Station WNGC453. Mobilcom Pittsburg's appeal of that action,[1] is pending before the United states Court of Appeals for the District of Columbia Circuit. Because Mobilcom Pittsburg timely appealed our action enforcing the provisions of 47 C.F.R. § 90.631(b), and because we have since invited other licensees to individually request a temporary stay of enforcement of the same provision pending the outcome of a rule making proceeding proposing to immediately eliminate the loading requirement,[2] we are treating the pleadings filed to date by Mobilcom Pittsburg as the equivalent of a request for a temporary stay of the enforcement of the loading requirement with respect to Station WNGC453. For the reasons stated below, we grant this request.

2. The Private Radio Bureau received an application from Mobilcom Pittsburg on June 27, 1991 for renewal of Specialized Mobile Radio (SMR) Service station license WNGC453. The license expired September 15, 1991. Correspondence sent by the Bureau to Mobilcom Pittsburg on January 29, 1992 advised that because three of the five channels authorized under WNGC453 had not been loaded to the required level by the license expiration date, these channels had cancelled automatically pursuant to the provisions of Section 90.631(b).[3]

3. Mobilcom Pittsburg petitioned for either reconsideration, or a waiver of the loading requirement. The Bureau denied the petition and waiver request. In *Memorandum Opinion and Order*, 8 FCC Rcd 351, we denied review and affirmed the renewal of two of WNGC453 channels. Mobilcom filed an appeal of our action on February 11, 1993.

4. On April 26, 1993, the Private Radio Bureau issued a superseding license for the two channels that were renewed in the *Memorandum Opinion and Order*. On May 26, 1993, Mobilcom petitioned to have its renewal application for all five channels reinstated and to retain that application in pending status pending action by the Court of Appeals on the appeal of the *Memorandum Opinion and Order*. We denied that request, noting that the *Memorandum Opinion and Order* was the final agency action with respect to the renewal application.[4] Mobilcom Pittsburg also appealed that order to the United States Court of Appeals for the District of Columbia Circuit.[5]

5. Recently, on May 20, 1994, we released a *Further Notice of Proposed Rule Making* in GN Docket No. 93-252 proposing rules to implement revised Sections 3(n) and 332 of the Communications Act dealing with the regulatory treatment of mobile services. The *Further Notice* seeks comment on whether to eliminate the automatic cancellation provisions of Section 90.631(b). On the basis of a petition from the American Mobile Telecommunications 0 Association to eliminate the rule, the rapid expansion of the SMR industry, and considerations of regulatory consistency, we proposed eliminating this aspect of the rule. *Further Notice*, paragraphs 67-73. In the interim, we invited licensees to individually request that the Private Radio Bureau staff temporarily stay enforcement of the automatic cancellation provisions of 47 C.F.R. § 90.631(b) pending the outcome of the rule making proceeding. *Further Notice*, n.133.

6. In light of the history of this proceeding and our subsequent *Further Notice*, we are considering Mobilcom Pittsburg's May 26, 1993, petition for reconsideration and reinstatement of renewal application, and other documents filed in this proceeding and before the Court, as the equivalent of a request for temporary stay of enforcement of Section 90.631(b) in accordance with footnote 133 in GN Docket No. 93-252. In addition, although the provision in footnote 133 for filing a temporary stay does not precisely fit the facts of this proceeding, we will treat this request in the same manner as if Mobilcom Pittsburg were eligible to make this request pursuant to footnote 133. In footnote 133, we stated that we would not grant a general stay of enforcement, but would entertain individual requests for a temporary stay pending the outcome of the rule making proceeding. We find that Mobilcom Pittsburg has met its

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[1] *Mobilcom Pittsburg, Inc. v. FCC*, Case No. 93-1156 (D.C. Cir., filed February 11, 1993).

[2] *See In the Matter of Sections 3(n) and 332 of the Communications Act, Further Notice of Proposed Rule Making*, GN Docket No. 93-252, FCC 94-100, 9 FCC Rcd _____ n.133, released May 20, 1994 (*"Further Notice"*).

[3] Section 90.631(b) provides in pertinent part that:

> [I]f at the end of five years a trunked system is not loaded to the prescribed levels and all channels in the licensee's category are assigned in the geographic area, authorization for trunked channels not loaded to 70 mobile stations cancels automatically at a rate that allows the licensee to retain one channel for every 100 mobiles loaded, plus one additional channel.

This loading requirement is being phased out, and the provision does not apply to authorizations granted on or after June 1, 1993. *See Report and Order*, PR Doc. 86-404, 3 FCC Rcd 1838, 1845-46 (1988).

[4] *Memorandum Opinion and Order*, 9 FCC Rcd 509 (1994).

[5] *Mobilcom Pittsburg Inc. v. FCC*, No. 94-1139 (D.C. Cir., filed February 24, 1994).

burden of justifying a temporary stay pending the outcome of the rulemaking proceeding to consider the elimination of the automatic cancellation provision because the record shows that in the brief time between acquiring its license from the from the original licensee and the time the original license expired, Mobilcom Pittsburg significantly increased the number of its subscribers, and that it was not warehousing spectrum.

7. Having determined to stay the enforcement of the automatic cancellation provision with respect to Station WNGC453 pending the outcome of our pending rule making proceeding, we find it appropriate to rescind our prior partial grant of Mobilcom Pittsburg's renewal application and to return the renewal application to pending status. Action on the renewal application will be taken consistent with the decision in GN Docket No. 93-252 whether to continue to apply the automatic cancellation rule to pre-June 1, 1993 licensees. Mobilcom Pittsburg is authorized to operate its five channel trunked system pending further action on its renewal application after our decision of GN Docket No. 93-252.

ORDERING CLAUSE

8. IT IS ORDERED THAT Mobilcom Pittsburg's request to temporarily stay the enforcement of Section 90.631(b) is granted.

9. IT IS FURTHER ORDERED that our prior action renewing WNGC453 for two of five channels is rescinded and that Mobilcom Pittsburg's renewal application is returned to pending status. Mobilcom Pittsburg is authorized to operate its five channel trunked SMR station licensed under WNGC453, during the pendency of the rule making proceeding in GN Docket No. 93-252, and until action is taken on the reinstated renewal application.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 86-285

In the Matter of

Amendment of the Schedule
of Application Fees Set
Forth in Sections 1.1102
through 1.1105 of the
Commission's Rules.

ORDER

Adopted: August 5, 1994; Released: August 19, 1994

By the Commission:

1. Before the Commission for consideration is a Motion for Stay filed by the law firm of Brown and Schwaninger, on behalf of its clients, requesting a stay of the effectiveness of our *Order* amending our Schedule of Application Fees pursuant to section 8(b)(1) of the Communications Act, as amended, 47 U.S.C. § 158(b)(1).[1] *See Amendment of the Schedule of Application Fees*, FCC 94-141, released June 8, 1994. Because the amended Schedule became effective on July 18, 1994, we are treating the motion as a request to suspend the Schedule's effectiveness.

2. Brown and Schwaninger has failed to make a sufficient showing to justify extraordinary relief. First, it has not shown a strong likelihood of success on the merits. Brown and Schwaninger contends that we erred by increasing our application fees by 14.8 percent, based upon the cumulative Consumer Price Index (CPI) increases since December 1989. They argue that section 8(b)(1) restricts increases in our application fees to no more than the cumulative increase in the CPI since October 1, 1991 for a maximum increase of 3.2 percent. Brown and Schwaninger apparently interprets section 8(b)(1)'s requirement that we not adjust our application fees until after October 1, 1991 to prohibit inclusion in the revised fees of changes in the CPI which occurred prior to October 1991.

3. Brown and Schwaninger's argument is not supported by the language of the statute. Section 8(b)(1) provides that increases or decreases in application fees are to be "determined by the net change in the Consumer Price Index since the date of the enactment of this section." Congress' most recent amendments to section 8 were signed into law on December 19, 1989.[2] *See* Omnibus Budget Reconciliation Act of 1989, Pub. Law No. 101-239, 103 Stat. 2106 (1989). Therefore, our calculation of the cumulative increases in the CPI commencing with December 1989 was fully consistent with the statute.

4. Brown and Schwaninger also contends that we increased certain application fees substantially beyond 14.8 percent. Newly revised section 1.1102 of the Commission's rules setting forth the adjusted application fees for private radio services combines the application fees with our regulatory fees since both fees are required with the filing of an application for a private radio license. In order to eliminate any confusion, we have instructed the Managing Director to republish the rule sections containing the Schedule of Application Fees by including a listing of the adjusted application fees separate from any regulatory fee.[3]

5. Brown and Schwaninger has failed to show that denial of extraordinary relief will result in irreparable harm to its clients. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). It argues that irreparable harm will occur to applicants subject to a fee payment because section 1.1111 of our rules governing refunds of application fees permits refunds only for overpayments of $8.00 or more and, consequently, no relief is available to applicants entitled to refunds of less than $8.00. 47 C.F.R. § 1.1111. We do not believe that a loss of $8.00 constitutes irreparable harm that "threatens the very existence of the movant's business," as the courts have required. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.2 (D.C. Cir. 1977). Moreover, any applicant, including applicants with overpayments of less than $8.00, may utilize our waiver procedures for obtaining relief when rigid adherence to our fee rules would result in unfairness. 47 C.F.R. § 1.1115. Thus, a procedure for compensatory relief exists even for those applicants requesting small refunds. *See Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d at 925.

6. Accordingly, IT IS ORDERED that the "Motion for Stay" filed by Brown and Schwaninger on July 11, 1994 IS DENIED.

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[1] Section 8(b)(1) states: The Schedule of Charges established under this section shall be reviewed by the Commission every two years after October 1, 1991, and adjusted by the Commission to reflect changes in the Consumer Price Index. Increases or decreases in charges shall apply to all categories of charges, except that individual fees shall not be adjusted until the increase or decrease, as determined by the net change in the Consumer Price Index since the date of enactment of this section, amounts to at least $5.00 in the case of fees under $100.00, or 5 percent in the case of fees of $100.00 or more. All fees which require adjustment will be rounded upward to the next $5.00 increment. The Commission shall transmit to the Congress notification of any such adjustment not later than 90 days before the effective date of such adjustment.

[2] In compliance with section 8(b)(1), we transmitted notice to Congress of our intention to increase the fees to reflect "the net change in the Consumer Price Index for all Urban Consumers (CPI-U) of 14.8 percent, calculated from December 1989 through August 1991." *See* letters to Honorable Ernest F. Hollings, Honorable John D. Dingle, Honorable Edward J. Markey, and Honorable Daniel K. Inouye, dated December 23, 1993. Congress interposed no objection to these adjustments.

[3] Also, we have instructed the Managing Director to correct a few errors contained in the Schedule of Application Fees.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 16, 1994

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Harpswell Public Cable Access Corporation - Petition for reconsideration of an application for a low power TV station - **Granted** (July 20, 1994).

Meister, Ralph E. - Petition for reconsideration of an application for a station at Stillwater, Oklahoma - **Denied** (July 8, 1994).

Roberts Broadcasting Company of Denver - Request for refund of a hearing fee for a station at Denver, Colorado - **Granted** (July 8, 1994).

Saturday Communications Limited Partnership - Request for refund of a hearing fee for a new FM station at Harrisburg, North Carolina - **Granted** (Jul 21, 1994).

Soler Broadcasting - Request for refund of a filing fee for a new FM station at Lacrosse, Florida - **Granted** (July 21, 1994).

WBBK Broadcasting, Inc. - Request for refund of a hearing fee for a new FM station at Kaukauna, Wisconsin - **Granted** (June 30, 1994).

Walker III, William H. - Request for refund of a hearing fee for a new FM station at Lake George, New York - **Granted** (June 29, 1994).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202)632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

JUL 2 0 1994

OFFICE OF
MANAGING DIRECTOR

Honorable Thomas H. Andrews
U.S. House of Representatives
1530 Longworth Building
Washington, D.C. 20515-1901

Attention: Ms. Suzanne C. Onos
Field Representative

Dear Congressman Andrews:

As the official responsible for the administration of the Commission's fee program, your letter addressing Harpswell Public Cable Access Corporation's application for a low power TV station (LPTV), filed by Mr. David I. Chipman, has been referred to me for response.

Mr. Chipman timely filed Harpswell's application during the annual filing window for LPTV licenses, but the Billings and Collection Branch returned the application for failure to submit a processing fee on May 3, 1994. Subsequently, by letter dated May 11, 1994, Mr. Chipman informed you of Harpswell's dismissal and requested your assistance in obtaining review of that action.

In view of the timeliness of Harpswell's opposition to the staff's action, as evidenced by Mr. Chipman's May 11th letter, which you referred to the Commission on May 31, we have decided to reconsider Harpswell's dismissal and, therefore, we will treat Mr. Chipman's letter as a petition for reconsideration requesting reinstatement of the application. Therefore, in a subsequent decision, we will consider fully the merits of Mr. Chipman's arguments for reinstating the Harpswell application.

Thank you for your interest and I hope the foregoing is responsive to your concerns.

Sincerely,

Andrew S. Fisher
Managing Director

JMullins:OGC
cc: File, Reading File, Attorney File, Jim Mullins, Larry Schaffner, GC Chron., Tom Holleran, OLA

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Alan C. Campbell, Esq.
Irwin, Campbell & Crowe, P.C.
1320 18th Street, N.W.
Suite 400
Washington, D.C. 20036

Vincent J. Curtis, Jr., Esq.
Fletcher, Heald & Hildreth
1300 North 17th Street
11th Floor
Rosslyn, Virginia 22209

Re: File No. BPH-930713MA

Dear Messrs. Campbell and Curtis:

This responds to a petition for reconsideration filed on behalf of Ralph E. Meister ("Meister"), former applicant for a new FM station at Stillwater, Oklahoma, an opposition filed on behalf of Patrick G. Walters ("Walters"), and Meister's reply to the opposition.

Meister's application was dismissed by the Chief, FM Branch for failure to remit his hearing fee in accordance with the deadline established by the November 2, 1993, Public Notice. That public notice announced that Meister's application was mutually exclusive with that of Walter's, and established January 6, 1994, as the hearing fee payment deadline.

Meister contends that his application should be reinstated nunc pro tunc. Specifically, Meister relies upon the fact that the Commission has suspended comparative broadcast proceedings following the decision in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993), which invalidated the Commission's integration policy as arbitrary and capricious. See Public Notice, "FCC Freezes Comparative Proceedings" ("Freeze Public Notice"), 9 FCC Rcd 1055 (1994). Meister acknowledges that he was required to pay his fee by January 6, 1994, prior to the release of the Freeze Public Notice on February 25, 1994, and further acknowledges that his failure to timely pay was attributable to the fact that his prior counsel's did not "properly notify him of the hearing fee deadline." Nevertheless, Meister argues that the freeze should be retroactively applied to December 17, 1993, the date of the Bechtel decision. According to Meister, failure to retroactively apply the freeze effectively creates a "no man's land" that prejudices and discriminates against applicants that are required to comply with procedural rules, which have been frozen for other pre-designation applicants.

Walters opposes Meister's petition for reconsideration. Walters characterizes Meister's "apparent confusion" over the Bechtel decision an "ingenious legal fiction," designed to obscure and excuse his prior attorney's neglect or inadvertent failure to notify Meister of the hearing fee deadline. Walters submits that had Meister been "confused" in the wake of the Bechtel decision, the proper course would have been to "file the fee on the required date and argue his 'legal position' later."

Meister replies by stating that Walters misconstrues his arguments. Meister reiterates his contention that the Bechtel decision effectively precluded the Commission from proceeding with pre-hearing procedures, including the payment of hearing fees. Meister contends that the Commission unfairly and improperly prejudiced his application by not retroactively applying the freeze. To remedy the inequities, Meister contends that his application should be returned to pending status, citing John Spencer Robinson, 5 FCC Rcd 5542 (Rev. Bd. 1990), in support of his position.

The Freeze Public Notice, issued February 25, 1994, establishes that during the stay, cutoff lists and window filings for new FM filings will not be issued, and that pending predesignation procedures (including hearing fee payments) will be suspended. The Bechtel decision did not require that the Commission suspend all pending broadcast applications that are mutually exclusive; and the Freeze Public Notice was not made retroactive to the Bechtel decision. Indeed, the Freeze Public Notice does not stay every broadcast proceeding involving mutually exclusive applicants. Rather, the Freeze Public Notice explicitly states that "[t]he Commission, Review Board, and Administrative Law Judges will continue to issue decisions only in those cases in which consideration of the applicants' comparative qualifications is unnecessary to resolve the case." 9 FCC Rcd at 1055. Additionally, the Freeze Public Notice encourages both pre- and post-designation settlements among pending applicants. The Freeze Public Notice thus only stays proceedings that involve consideration of the applicants' integration proposals, a criterion invalidated by Bechtel.

Meister's hearing fee deadline was not pending, but had already expired, at the time the Commission issued the Freeze Public Notice. The Freeze Public Notice did not stay or affect Meister's hearing fee deadline. Therefore, Meister was required to file his hearing fee in a timely manner; Meister's failure to do so required dismissal of his application. See 47 U.S.C. Section 158(c)(2); 47 C.F.R. Section 1.1107; see also Establishment of a Fee Collection Program, 2 FCC Rcd 947, 956-57 (1990).

Meister's claim that his application was relegated to "no man's land" status and unfairly discriminated against rings hollow. Adherence to the hearing fee deadline, here, did not prejudice or discriminate against Meister. Meister was not similarly situated with subsequently filed applications, for which no hearing fee deadlines had been established or had been pending at the time of the Freeze Public Notice and expressly suspended thereby. The public notice that established Meister's hearing fee deadline was released November 2, 1993, prior to both the Bechtel decision and the subsequent Freeze Public Notice. Thus, Meister's obligation to timely pay his hearing fee was unaffected by the subsequent court and Commission action. Had Meister timely filed his filing fee, as had Walters, his application would have been deemed pending and afforded consideration under the Commission's current policy that encourages and facilitates settlements during the freeze.

Finally, John Spencer Robinson, supra, cited by Meister as support for his argument that dismissal of his application was "inequitable," for which the Commission should grant relief, is inapposite. In John Spencer Robinson, the fee schedule changed prior to the applicable hearing fee deadline. There, the applicant was genuinely confused and sought advice from Commission staff as to the proper fee due, and ultimately paid his fee in accordance with the previous, but no longer applicable fee schedule. (Additionally, that case was decided outside the proper scope of delegated authority, see John H. White, 9 FCC Rcd 1016, n.1 (1994)). Meister does not allege that his failure to timely pay his hearing fee was attributable to his reliance upon, and "confusion" caused by, the Bechtel decision, nor did Meister attempt to file his hearing fee and seek waiver of the fee based on the Bechtel decision. See 47 C.F.R. Section 1.1115. Rather, as Walters points out, Meister admits that at the time, he did not timely file his fee due to the fact that his attorney had failed to advise him of the hearing fee deadline.

Accordingly, Meister's petition for reconsideration is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 8 1994

Thomas J. Hutton, Esq.
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, D.C. 20037-1194

Re: Roberts Broadcasting Company of Denver
Denver, Colorado
Fee Control # 9307088170022001

Dear Mr. Hutton:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

___X___ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

21 JUL 1994

David Honig, Esq.
1800 N.W. 187th Street
Miami, Florida 33056

Re: Saturday Communications Limited Partnership
New FM Station
Harrisburg, North Carolina
Fee Control # 9209148170384004

Dear Mr. Honig:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above-referenced submission (§ 1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission had adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

__X__ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but one application, and that application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
For Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 1994

Jose D. Soler, Esq.
Soler Broadcasting, Inc.
P.O. Box 316
Coamo, Puerto Rico 00769

Re: Fee Control # 9305178195140004

Dear Mr. Soler:

This will respond to your request for refund of a filing fee filed on behalf of Soler Broadcasting ("Soler") in connection with its construction permit application for a new FM station at Lacrosse, Florida.

You state, and your documentation shows, that Soler's application was filed during the Commission's suspension of the applicable filing window, and thus was returned as unacceptable for tender. The Commission's rules specifically provide for a refund of the filing fee whenever an application is filed outside a window filing period and returned. See 47 C.F.R. §1.1111(a)(6); see also Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 3 FCC Rcd 5987, 5988 (1988). Under the circumstances, refund of the filing fee is appropriate.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $2,030.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 30 1994

John Wells King, Esq.
Haley, Bader & Potts
4350 North Fairfax Drive
Suite 900
Arlington, Virginia 22203-1633

Re: WBBK Broadcasting, Inc.
New FM Station
Kaukuana, Wisconsin
Fee Control # 9209148170384003

Dear Mr. King:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

___ No fee is required for the above referenced submission (§1.1111(a)(1)).

___ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

___ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

___ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

___ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

___ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

X In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

JUN 29 1994

OFFICE OF
MANAGING DIRECTOR

A. Wray Fitch III, Esq.
Gammon & Grange, P.C.
8280 Greensboro Drive
7th Floor
McLean, Virginia 22102

Re: William H. Walker III
New FM Station
Lake George, New York
Fee Control #9304218170005001

Dear Mr. Fitch:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

___X___ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2))

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 94-38
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	
Protection and Competition	)	MM Docket No. 92-266
Act of 1992: Rate Regulation	)	

SECOND ORDER ON RECONSIDERATION,
FOURTH REPORT AND ORDER,
AND FIFTH NOTICE OF PROPOSED RULEMAKING

Adopted: February 22, 1994 ; Released: March 30, 1994

By the Commission: Commissioner Barrett issuing a statement.

Comment Date: June 29, 1994
Reply Comment Date: July 29, 1994

Table of Contents

	Paragraphs:
I. Introduction	1
II. Second Order on Reconsideration	9
A. Executive Summary	9
B. Regulations Governing Rates of Basic and Cable Programming Service Tiers	43
1. Background	43
2. Impact on the National Economy	54
3. Estimating the Competitive Differential	67
a. Disaggregated Treatment of Low Penetration, Overbuild, and Municipal Systems	72
b. Improved Variables	77
c. Tests for the Effects of Cost and Demand Differences	81

d. System Size and the Competitive Differential 86

e. The New Competitive Differential 90

4. Applying the Competitive Differential 106

a. Systems Not Entitled to Transition Relief 114

b. Systems Entitled to Transition Relief 117

(i) Systems Owned by Small Operators 117

(ii) Low-Priced Systems 123

c. Application of Transition Relief 127

d. Regulated Rates at the End of the Transition Period 132

e. Calculation of Refund Liability 135

f. Notice to Subscribers 139

g. Procedural Issues for Franchising Authorities 144

h. Pending Complaints Before the Commission 150

5. Commission Authority to Adopt the Modified Ratemaking Approach 153

6. The Price Cap Governing Cable Service Rates 169

a. Calculation of External Costs 169

b. Copyright Fees 178

c. Pole Attachment Fees 181

7. Other Rate Issues 183

a. Commercial Rates 184

b. Rate Relief for Alaska and Hawaii 186

c. Basic Tier Access Charge 189

C. "A La Carte" Packages 191

D. Small Systems 201

1. Small System Administrative Relief 201

a. Background 201

(i) Streamlined Rate Reductions 208

(ii) Company-Wide Averaging of Equipment 218

(iii) Other Proposals for Administrative Relief 222

2. Headend vs. Franchise Area Definition of Small Systems 226

3. Termination of Rate Regulation Stay for Small Systems 228

III. Fourth Report and Order 229

A. Introduction 229

B. Adjustments to Capped Rates for Addition and Deletion of Channels 231

1. Background 231

2. Regulatory Goals 236

3. The Going-Forward Methodology 239

C. Upgrades Initiated Shortly Before Rate Regulation 250

IV. Fifth Notice of Proposed Rulemaking 254

V. Regulatory Flexibility Act Analysis 258

A. Final Analysis for the Fourth Report and Order and Second Order on Reconsideration 258

B. Initial Regulatory Flexibility Analysis for the Fifth Notice of Proposed Rulemaking 263

VI. Paperwork Reduction Act 271

VII. Procedural Provisions 272

VIII. Ordering Clauses 274

Appendices

I. Introduction

1. In the April 1993 Report and Order and Further Notice of Proposed Rule Making ("the Rate Order") in this docket,[1] the Commission adopted cable rate regulation rules and policies pursuant to the Cable Television Consumer Protection and Competition Act of 1992.[2] In the Rate Order, we adopted a "benchmark" approach for setting initial rates for regulated cable service. Under the benchmark approach, regulated cable systems were required to use a formula established in the Rate Order to calculate an applicable benchmark -- an estimate of the rate that a cable system subject to effective competition with similar characteristics would charge.[3] Rates of cable systems at or below the benchmark were presumed to be reasonable; rates above the benchmark were presumed to be unreasonable. Cable systems whose rates exceeded the applicable benchmark were required to reduce their rates either to the benchmark or by ten percent, whichever reduction was less.[4] This ten percent

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[1] Report and Order and Further Notice of Proposed Rulemaking ("Rate Order"), MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 (1993).

[2] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. Section 534 (1992)(hereinafter "the 1992 Cable Act" or "the Cable Act of 1992"). The Cable Act of 1992 amends Title 6 of the Communications Act of 1934, as amended, 47 U.S.C. Section 521 et seq. (hereinafter "the Communications Act"). Our regulations implement Sections 3, 9, and 14 of the Cable Act of 1992.

[3] In the First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428 (released Aug. 27, 1993), 9 FCC Rcd 1164 (1993), 58 FR 46718 (Sept. 2, 1993) ("First Recon. Order" or "Second Report & Order" or "Second R&O" or "Third Further NPRM"), we affirmed our decision to use a benchmark approach based on rates charged by systems subject to effective competition as the primary method for determining the reasonableness of regulated cable rates. We, however, left a number of issues to be decided in subsequent orders on reconsideration. This Order, and our Third Order on Reconsideration (released today) resolve pending petitions for reconsideration of the Rate Order, with the exception of leased access issues, which will be considered in a future order. See Rate Order at paras. 485-541.

[4] The requirement of a ten percent rate reduction, applied to a per-channel rate, was derived from aggregate programming service and equipment charges under a methodology prescribed by the Commission.

"competitive differential" represented the average difference that the Commission determined existed between the rates of competitive and non-competitive cable systems.

2. In this decision, we amend our cable rate regulations to ensure both that the rates consumers pay for regulated cable services are reasonable and that our rules continue to promote economic growth in the cable industry. Using a revised economic model, we have recalculated the competitive differential and have concluded that the 17 percent differential determined by the revised model more accurately estimates the difference between effectively competitive and noncompetitive cable rates than the ten percent differential established in the Rate Order.

3. In addition, we have reconsidered our benchmark approach. As the record stands, we believe that all regulated cable systems should be required to establish rates based on the revised competitive differential unless they justify other rates through a cost-of-service showing. We conclude that this result is warranted for several reasons, including the language of the statute, economic theory, and the legislative history of the 1992 Cable Act establishing that cable systems generally have had an opportunity to exercise market power.[5] Furthermore, the Commission's data continues to demonstrate that rates charged by systems that are not subject to effective competition, as defined in the statute, are generally higher than rates charged by systems facing effective competition. We believe, therefore, that our revised competitive differential best estimates the extent to which noncompetitive systems have been charging unreasonable rates.

4. We are, however, establishing special transition rules that provide that noncompetitive cable systems charging relatively low prices (as measured by a revised benchmark that incorporates the 17 percent competitive differential) will not have to reduce their rates by the full competitive differential until the Commission has collected and analyzed data about such operators' prices and costs, and determined whether such a reduction is inappropriate. We anticipate that some data relevant to this issue will be collected as part of an industry cost study to be conducted by the Commission, while other data will be submitted by affected cable systems. At the conclusion of this process, the regulated rates of such systems will be set to reflect the full 17 percent differential if our analysis does not show that the resulting rates would be unreasonably low -- that is, the rates would be lower than they would be if set by competitive pressures as determined by cost comparisons between

---

[5] See H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 2 (1992)(hereinafter "Conference Report"); Cable Act of 1992, Section 2(a)(2); see also infra paras. 43-46.

noncompetitive systems and systems subject to effective competition.

5. We are following a similar approach with respect to cable systems owned by small cable operators, defined as cable companies that serve a total subscriber base of 15,000 or fewer. We will not require small operators to apply the new competitive differential until the Commission has collected and analyzed data about such operators' prices and costs. As with systems that charge relatively low prices, we anticipate that some data relevant to this issue will be collected as part of an industry cost study to be conducted by the Commission, while other data will be submitted by affected cable systems. At the conclusion of our analysis, small operators will have to apply the full competitive differential in the absence of evidence showing that its application would set their rates at unreasonable levels based on any unique costs that are systematically experienced by small operators, as well as differences demonstrated between noncompetitive and competitive small operators.

6. In addition, we adopt a Fourth Report and Order establishing a "going-forward" mechanism to govern future rate adjustments resulting from channel additions or deletions, or system upgrades. We also issue a Fifth Notice of Proposed Rulemaking to seek comment on whether and how our benchmark methodology should apply to systems with more than 100 channels. In addition, we seek comment on whether the going-forward rules adopted in this Order should be modified for systems with more than 100 channels and, more generally, whether our going-forward methodology should be modified to provide greater or lesser compensation to operators when channels are added or deleted from regulated tiers. We also seek comment on whether we should allow cable operators to charge higher rates for cable service provided to commercial establishments than to residential households. Finally, we seek comment on whether we should adopt further requirements to govern systems' move from transition relief to full reduction rates.

7. Simultaneously, we are issuing two related orders. One order resolves a variety of cable rate regulation issues that do not relate to rate calculations.[6] The other order establishes interim rules governing the "cost-of-service" procedures that cable operators may invoke if they believe that their costs of providing regulated cable service will support rates that are higher than those produced by the revised benchmark approach

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[6] Third Order on Reconsideration in Cable Rate Regulation and Tier Buy-Through Proceedings, MM Docket 92-266 and 92-262, FCC 94-40 (adopted Feb 22, 1994).

adopted in this Order.[7]

8. As a result of these revised rules, most regulated cable operators will have to apply the revised competitive differential by May 15, 1994, or, pursuant to some conditions, by July 14, 1994. A limited number of operators will be eligible for special transition treatment pursuant to which they will make smaller or no, rate reductions pending completion of price/cost studies by the Commission.[8] Cable systems that are eligible for transition treatment will be subject to the full 17 percent reduction later, unless our price/cost analysis reveals that its application to these systems is inappropriate.

II. Second Order on Reconsideration

A. Executive Summary

9. After Congress deregulated most cable rates in 1984,[9] the rates for many subscribers rose substantially.[10] Congress proceeded to study the cable industry, and found that "most cable television subscribers have no opportunity to select between competing cable systems." The result, it determined, "is undue market power for the cable operator as compared to that of consumers."[11] This conclusion is supported by the findings of numerous economists.[12]

10. In the 1992 Cable Act, Congress determined that the rates charged by cable systems that face head-to-head competition should not be regulated. Congress further decided that cable systems operated by municipalities and cable systems with low

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[7] See Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 93-215, FCC 94-39 (adopted Feb. 22, 1994)("Cost Proceeding").

[8] Operators that elect to establish rates based on cost-of-service are also not required to reduce rates by the competitive differential, subject to refund liability. See id.

[9] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

[10] See U.S. General Accounting Office, Telecommunications: 1991 Survey of Cable Television Rates and Services, Report to the Chairman, Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, House of Representatives (July, 1991)(hereinafter "GAO Report").

[11] Conference Report at 2.

[12] See infra para. 44 and note 60.

penetration should be deemed, as a matter of law, to be subject to "effective competition," and hence not subject to rate regulation.[13] But Congress provided that the rates charged by all other cable systems for basic tier service and upper program (i.e., cable service) tiers should be subject to regulation.[14]

11. The 1992 Cable Act directs the Commission to adopt regulations to ensure that rates for the basic service tier are "reasonable."[15] Congress made clear that the basic tier regulations must "be designed to achieve the goal of protecting subscribers" from paying rates that are higher than those that would be charged if their cable operator faced "effective competition."[16] Congress also required the Commission to "take into account" seven different factors, most of which relate to the costs of providing, and the revenues derived from, basic service.[17] While providing that basic tier rates must be "reasonable," establishing "the goal of protecting consumers," and directing the Commission to "take into account" seven different factors, Congress did not require the Commission to follow a specific methodology in setting rates. Indeed, the Conference Committee deleted a provision requiring a formulaic approach, and explained that it was giving "the Commission the authority to choose the best method of ensuring reasonable rates for the basic service tier."[18] Congress followed a similar approach with respect to regulated upper tier service.[19]

12. In April 1993, the Commission adopted cable rate regulations to implement these statutory provisions. At that time, we determined that the best approach for meeting our Congressional mandate was to rely principally on a benchmark methodology that requires noncompetitive systems to set rates at

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[13] Communications Act, Section 623(l)(1), 47 U.S.C. Section 543 (l)(1).

[14] Id. at Sections 623(a)(2)(A),(B), 47 U.S.C. Sections 543(a)(2)(A),(B).

[15] Id. at Section 623(b)(1), 47 U.S.C. Section 543(b)(1).

[16] Id.

[17] Communications Act, Section 623(b)(2)(C), 47 U.S.C. Section 543(b)(2)(C).

[18] Conference Report at 62.

[19] See Communications Act, Section 623(c), 47 U.S.C. Section 543(c); Conference Report at 64-65.

levels that approximate competitive prices.[20] That conclusion was derived both from the language of the statute mandating reasonable rates and from economic theory, which states that prices charged in a competitive marketplace are reasonable for operators and subscribers alike.[21] Competitive prices accurately reflect the true economic costs of the services provided.[22] Such prices, thus, provide market signals to guide consumer purchasing decisions and producer investment choices at levels that lead to the greatest net benefit from the consumption of those services.

13. In April 1993, we further concluded that the benchmark methodology should be coupled with a cost-of-service process to permit operators to prove, on a case-by-case basis, that their costs support rates higher than those produced by the benchmark calculations.[23] In addition, we adopted a "price cap" mechanism to ensure that future adjustments to initial rates set pursuant to the benchmark will be reasonable for both operators and subscribers.[24] We also announced that we would (1) examine systems with rates substantially above competitive levels to determine whether their rates were justified by higher costs, and (2) seek to refine our analyses through further industry surveys.[25] This comprehensive regulatory plan, we decided, addressed all of the various statutory factors and ensured that rates for all regulated service tiers will be reasonable, as required by the Act.[26]

14. The petitions for reconsideration filed in this

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[20] Rate Order at paras. 205-207.

[21] See Communications Act, Section 623(b)(1), 47 U.S.C. Section 543(b)(1); see also F. Scherer and D. Ross, Industrial Market Structure and Economic Performance (3d. ed. 1990) at 20 (competitive markets result in the lowest prices for consumers consistent with a return sufficient to maintain investment needed to produce the industry's output efficiently).

[22] Scherer and Ross at 20.

[23] Rate Order at para. 15.

[24] Id.

[25] Id.

[26] See id. at paras. 15, 179-180. In our First Recon. Order in this proceeding, we, inter alia, affirmed our decision to use a benchmark system based on rates charged by systems subject to effective competition as the primary method of assessing the reasonableness of regulated cable rates. First Recon. Order at para. 13.

proceeding have given us an opportunity to undertake a comprehensive review of our rate regulation scheme. The evidence and analysis now before us support our earlier conclusion that the benchmark methodology, coupled with a cost-of-service process, is an appropriate means of setting initial regulated cable rates. At the same time, the record and further analysis also persuade us that we should modify our methodology so as best to set "reasonable" rates for cable systems that are not subject to effective competition, as defined in the statute. Accordingly, we adopt several important modifications to our current rate regulation approach.

15. In implementing the congressional directives on reconsideration, we are guided principally by economic theory, which states that a cable system that is not subject to competition generally will have an opportunity to charge a higher than competitive rate for its package of program services and equipment. As a result, in our view, a noncompetitive rate is not a "reasonable" rate. Rather, "reasonable" rates are lower than noncompetitive rates, and should reflect a price similar to that charged by a system that faces competition.

16. Moreover, upon further reflection, we find no conclusive basis in economic theory or the record to assume that a cable operator that is subject to little or no competition, and whose rates, nonetheless, appear to be low (i.e., at or below a benchmark), is not exercising market power. Market power is reflected in the gap between price and cost. Without more detailed information on cost and demand conditions, it is impossible to determine the amount by which an operator's revenues exceed its costs. An operator's rates may be relatively low on account of the cost or demand conditions it faces, rather than because the operator is not exercising market power. Our analysis indicates that behavior reflective of market power may exist generally within the noncompetitive sector of the cable industry. In this Order on Reconsideration, we calculate a new "competitive differential" -- our best estimate of the average amount by which the rates charged by a cable operator not facing effective competition exceeds "reasonable" rates -- and conclude that it should apply to all regulated cable systems.

17. However, because we do not have sufficient cost data at this time, we are establishing transition rules for some cable operators. First, operators with relatively low prices (as measured by their position vis-a-vis the revised benchmark) will not be required immediately to reduce rates by the new competitive differential. The full reduction for these operators will be deferred until the Commission has collected and analyzed data about such operators' prices and determined whether the full reduction is inappropriate. As indicated, some data on costs and prices will be collected as part of an industry cost study to be conducted by the Commission. Cable operators and other

interested parties will be given the opportunity to present information on costs and prices to help provide a complete record. This will give cable operators the opportunity to submit evidence showing that cable systems charging rates at or below the new benchmark are not exercising market power and, therefore, might warrant an application of less than the full revised competitive differential.

18. Second, we will not require cable systems owned by small operators to apply the competitive differential immediately. We recognize that some small systems may face higher than average costs. We also recognize that small operators may not have the financial resources to sustain the impact of a significant rate reduction. Our cost study thus will also permit small operators to present evidence showing whether, or to what extent, our revised competitive differential should be applied to them due to (1) the presence of unique costs, as identified in the record, that are systematically experienced by small operators, and (2) any differences that may be demonstrated between noncompetitive and competitive small operators. We note, however, that the existing record does not enable us to find that small operators and relatively low priced operators should not eventually be required to apply the full competitive differential. They therefore will be required to apply the full differential unless our analysis of the price/cost data we collect persuades us that a smaller competitive differential should be applied to them.

19. As noted, we also adjust the competitive differential in this Order. We previously calculated the competitive differential as approximately ten percent.[27] We made that calculation by analyzing data drawn from a sample of cable systems that included regulated systems and each of the three types of systems that Congress has exempted from rate regulation -- systems that have penetration rates less than 30 percent ("low penetration systems"), systems that face actual competition ("overbuilds"), and systems that are operated by municipalities ("municipals").[28] Our previous approach simply averaged the data from all systems subject to effective competition. On reconsideration, we have more closely analyzed the data from all three types of systems, and have used a qualitative, rather than arithmetic, analysis to determine the differential whose application best approximates the "reasonable" rate that would be charged by a system that faces effective competition. Our revised competitive differential of 17 percent also reflects our analysis of the various factors that Congress has instructed us

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[27] Rate Order at paras. 14, 180.

[28] See Communications Act, Section 623(l)(1), 47 U.S.C. Section 543(l)(1).

to take into account.

20. Our refined approach will help ensure that consumers served by noncompetitive systems will be offered regulated services at reasonable rates.[29] In addition, when the rates for regulated services fall as a result of the application of the competitive differential, the quantities of these services demanded by consumers should rise as new subscribers are added, fewer subscribers disconnect, and individual subscribers purchase additional programming services. These increases in demand will help offset the effect of the required rate reductions on operator revenues.[30] The increased sales of existing regulated services should also be supplemented by demand for new services, both regulated and unregulated.

21. In particular, reducing regulated service rates will increase operators' motivation to invest in unregulated services that will apply advanced technology and to introduce entirely new services, such as broadband interactive services. Cable systems that now offer regulated service without competition will have an incentive to upgrade their systems with new capabilities and will have an incentive to introduce enhanced functions, such as interactivity, that are not subject to rate regulation. These developments will benefit operators by increasing revenues and benefit subscribers by increasing the affordability and availability of unregulated service offerings.

22. Our "going-forward" mechanism and cost-of-service procedures also will facilitate the development of new regulated services. For instance, because we are adopting a "going-forward" methodology for increasing rates when new program services are added to regulated service tiers, operators may launch new program services as part of regulated service tiers.

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[29] It should be emphasized that not all consumers are assured savings from rate regulation. Under the Act, rate regulation occurs only when a local franchising authority is certified by the Commission to regulate basic service rates and when a subscriber complains about upper tier rates to the Commission. See Communications Act, Sections 623(a)(3), (c)(1)(B); 47 U.S.C. Section 543(a)(3), (c)(1)(B). Although many operators have voluntarily restructured their offerings in an effort to comply with the Commission's rate standards, the reliability of those efforts can only be measured, and the ongoing benefits of rate regulation can only be assured, in those cable communities where regulation is actually triggered.

[30] The level of subscriber penetration was 61.5 percent in 1992, is estimated to have increased to 62.4 percent in 1993 and is forecast to increase to 63.3 percent in 1994. Department of Commerce, U.S. Industrial Outlook 1994, at 31-6.

A key concern expressed by operators and programmers throughout this proceeding has been that the benchmark approach may not permit operators to respond to marketplace incentives to expand the services included in regulated program tiers. The "going-forward" methodology set forth in this Order provides such incentives for the benefit of operators, programmers, and subscribers alike.

23. Our approach to rate-setting preserves incentives to invest in new services without imposing the burdens of financing new, unregulated offerings on regulated service subscribers. There is no sound policy reason to permit regulated operators to charge rates for regulated services that are higher than reasonable levels in order to support investment in plant used principally to provide unregulated services. Indeed, it has long been the Commission's policy to protect regulated ratepayers from subsidizing unregulated offerings through supra-competitive regulated rates.[31] Rather, the risk of providing new, unregulated services has been placed, appropriately, on investors and shareholders. We see no reason to depart from that policy here.

24. We note that the regulatory system we have adopted for cable rate regulation on a going-forward basis is in essence a price cap scheme that is similar in many respects to the price cap regime we have adopted for the telephone industry. Rates set by applying the competitive differential are capped at that level, and cable operators may increase rates only to reflect inflation, increases in external costs such as franchise-related costs, and to reflect the costs of additional services. Our regulatory approach -- like telephone price caps -- directly regulates the prices charged to subscribers rather than indirectly regulating prices through an examination of underlying costs. Accordingly, we fully anticipate that the public will see similar benefits to those we have already witnessed from our telephone price cap regulations: lower prices for regulated services, service innovation, and increased operator efficiency, all of which contribute to industry growth and increased

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[31] Our interim cost-of-service rules issued today will also help guard against this cross-subsidization. See Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 93-215, FCC 94-39 (adopted Feb. 22, 1994). See also Joint Cost Order, CC Docket 86-111, 2 FCC Rcd 1298 (1987) (Report and Order), recon., 2 FCC Rcd 6283 (1987), modified on recon., 3 FCC Rcd 6701 (1988), aff'd sub nom., Southwestern Bell Co. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

competition.[32] We also believe that, as the cable and telephone industries converge, it is important to treat them with as much regulatory parity as possible. Adoption of our revised approach for regulating cable rates thus is a significant step in the right direction.

25. The specific changes we are making on reconsideration are as follows: First, as noted above, we are strengthening our statistical and economic model for estimating the difference between the rates charged by systems facing effective competition and those that do not. In our April 1993 Rate Order we estimated the competitive differential to be approximately ten percent.[33] Numerous petitioners have challenged our methodology for deriving that figure on a variety of grounds. In response to those challenges, we have undertaken a broad review of our methodology and have refined it.

26. Our new methodology was developed in part by addressing the statistical issues identified by commenters and our staff, such as using a corrected data set and revising the treatment of equipment and installation revenues.[34] The principal difference in calculating the new competitive differential, however, is a revised economic analysis that reflects more accurate assessments of the different types of systems that the statute defines as subject to effective competition. As noted above, Congress listed three types of systems as being subject to "effective competition" -- low penetration systems, overbuilds, and municipals.[35] As also noted above, Congress directed the Commission, when determining whether rates are reasonable, to be guided by the goal of protecting subscribers from rates higher than those charged by those three categories of systems.

27. Statistical analysis reveals that each of the three types of systems has its own competitive differential. Because the three classes of systems differ from each other, we conclude that it is more appropriate to consider the competitive differential for each type of system individually than it is to

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[32] See Price Cap Performance Review for AT&T, CC Docket No. 92-134, 8 FCC Rcd 6968 (1993) ("Report and Order"); see also Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, FCC 94-10 (released Feb. 16, 1994) ("Notice of Proposed Rulemaking").

[33] Rate Order at paras. 14, 180.

[34] See Technical Appendix for an explanation of these changes.

[35] Communications Act, Section 623(l)(1), 47 U.S.C. Section 543(l)(1).

average the data relating to all three system types.[36] We also conclude that we are not required by the statute to compute the competitive differential simply by averaging, without evaluation, the rates charged by the three different types of systems. Rather, we interpret the Act as requiring us to "take into account" or "consider" the rates charged by each type in determining reasonable rates.[37]

28. In selecting the best method of setting reasonable rates on reconsideration, we conducted an economic analysis that considered the competitive differential for each of the three categories of systems that Congress defined as facing "effective competition," as well as the other statutory factors, the facts of record, and the comments of interested parties. This analysis reveals that the rates of low penetration systems are not statistically different as a group from the rates of systems subject to rate regulation. We are not persuaded, however, that low penetration systems and noncompetitive systems are charging reasonable rates. Rather, we conclude that there may be a variety of reasons other than competitive pressures, as measured by the statutory definition, that have led to low penetration rates. While Congress has concluded that low penetration systems should be exempt from rate regulation, it does not follow that the rates they charge provide the best basis for determining the competitive differential that should apply to noncompetitive systems.

29. We further believe that systems in the overbuild sample provide the most informative data with regard to estimating reasonable rates. Our best estimate of the difference between the rates charged by overbuilds and noncompetitive systems is 16 percent. That figure takes into account the fact that cable operators generally do not compete head-to-head in the entire franchise area they serve. Specifically, our data show, as we expected, that rates decrease as the extent of competition increases. We thus have corrected for the lack of full competition throughout an entire franchise area when computing the competitive differential for overbuild systems.

30. In focusing on the overbuild sample, it is also appropriate to adjust the 16 percent figure to take into account the fact that cable operators serving the same area may adopt

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[36] Specifically, we applied an F test, a standard test of the equivalence of several parameters, to the variables representing the three competitive samples. They proved to be statistically significantly different at much better than the 1 percent confidence level.

[37] Communications Act, Sections 623(b)(2)(C)(i), (c)(2)(B); 47 U.S.C. Sections 543(b)(2)(C)(i), (c)(2)(B).

parallel or coordinated pricing practices. That is, they may recognize, over time, that it makes more economic sense not to compete vigorously, but to coordinate their prices tacitly.[38] Economic theory states that firms operating in oligopoly structures may be expected to behave in that manner.[39] Thus, prices observed in an overbuild situation may well be above the purely competitive level. We therefore conclude that the observed 16 percent average competitive differential for overbuild systems underestimates the true competitive differential. Our data indicate that the rates charged by overbuild systems are lowest at the outset of competition and then rise over time. This is consistent with parallel pricing behavior and strengthens our conclusion that the best estimate of the overall competitive differential is greater than the overbuild differential of 16 percent.[40]

31. The largest differential, 37 percent, arises in the comparison of the rates charged by noncompetitive systems with those charged by municipal systems and the privately owned systems that compete with them. Arguably, this differential may be the most accurate measure of the competitive differential because government-operated entities may be presumed to charge reasonable rates and have no incentive to engage in the parallel or tacitly coordinated pricing practices discussed in the context of overbuild systems. It has been suggested, however, that municipal systems may not be earning a profit. The record evidence on this point is inconclusive. Because of these concerns, we separately examined the rates charged by the privately-owned cable systems in our sample of "municipal" systems. The competitive differential is equally large for these private systems, which suggests that the rates charged by the public and private systems in our municipal sample are reasonable. However, in view of the small number of systems in the municipal category (only eleven) and our concern that they may not be representative, we believe that we should not rely as heavily on municipals as we otherwise might in estimating the competitive differential.

32. After reviewing the data from all three types of non-regulated systems, but giving the most emphasis to the data

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[38] Economic theory refers to this behavior as "conscious parallelism." F.M. Scherer and D. Ross, Industrial Market Structure and Economic Performance (3d.ed. 1990) at 339-347.

[39] See generally, id. at 199-226.

[40] The 16 percent competitive differential calculated for overbuild systems reflects an average that is weighted toward systems that have been in competition for three or more years because there are more of these older systems than newer ones.

relating to overbuilds, we have selected 17 percent as the revised competitive differential. In selecting that figure, we were guided by the 16 percent figure estimated from our data on overbuilds that measures full head-to-head competition. We moved upward from 16 percent to reflect our conclusion that cable operators in an overbuild situation are likely over time to develop a tacit understanding of rate levels that may limit the intensity of rate competition. However, we did not depart upward as far as we might have, despite the evidence relating to municipal systems, on account of concerns about the interpretation of the data in our municipal subsample and on account of our consideration of low penetration systems. Furthermore, we were guided by our belief that consumer welfare is best served by financially sound cable operators.

33. It should be emphasized that this 17 percent rate reduction is not in addition to the prior ten percent rate reduction that some operators already have applied. Rather, those operators that have already established rates based on a ten percent competitive differential will only be required to adjust rates by approximately seven percent.[41]

34. Second, with the limited exception provided by the transition mechanism, we will require all noncompetitive systems that do not invoke the cost-of-service option to reduce their rates by the revised competitive differential. Cable systems that do not do so will be subject to refunds ordered by the franchising authority or the Commission once they become regulated.[42] In the April 1993 Rate Order, we concluded that operators whose rates on the date of regulation are "below benchmark" should not be required to reduce those rates, despite the fact that they face no effective competition. As noted above, however, we have concluded upon further reflection that behavior reflective of market power may exist generally within the noncompetitive sector of the cable industry. For this reason, we have concluded that it is preferable to apply a single

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[41] The additional seven percent reduction is approximate rather than exact because we have made other changes in the benchmark calculation. As explained in more detail, infra, we have expanded the number of variables used to determine what rate a similar system facing effective competition would charge. The additional variables make the benchmark calculation more accurate.

[42] We will not, however, impose refund liability on systems that implement the rate reduction provisions of this Order by July 15, 1994 for the period between May 15 and July 15, 1994, as long as the system meets certain conditions to maintain the status quo during that period. We discuss these conditions at note 141, infra.

percentage adjustment to all noncompetitive systems.

35. At the same time, our lack of cost-price data regarding small operators and relatively low-priced systems persuades us that we should not apply the full competitive differential to these categories as of the effective date of our new rules. On the basis of our refined statistical analysis, we therefore continue to believe that our primary approach for regulating cable rates at this time should incorporate a benchmark mechanism. Accordingly, cable operators whose September 30, 1992 rates (when adjusted by the full 17 percent competitive differential and permitted increases) are above the revised benchmark must apply the full differential or invoke cost-of-service proceedings. Cable operators whose March 31, 1994 rates are at or below the new benchmark do not have to reduce their rates at this time, pending the Commission's collection and analysis of information about such operators' prices and costs. And, cable operators whose March 31, 1994 rates are above the new benchmark, but whose rates would be at or below the new benchmark if the revised competitive differential were applied in full to their September 30, 1992 rates, must bring their rates down to the new benchmark immediately, but do not have to apply the full competitive differential pending our analysis of prices and costs. At the conclusion of our cost study, cable operators that do not apply the full revised competitive differential immediately will be required to do so unless our analysis reveals that application of the 17 percent differential to those systems would be inappropriate.

36. We are also not requiring small operators, defined for these purposes as operators serving a total subscriber base of 15,000 or fewer subscribers, and not affiliated with or controlled by larger operators, to apply the revised competitive differential immediately. While some commenters have submitted evidence to suggest that some smaller systems may face higher costs compared to larger systems, the absence of industry-wide cost data leaves us unable to conclude that all small systems face systematically higher costs.[43] Moreover, while publicly available financial data indicate that large operators are better able to absorb further rate reductions, the financial data we have concerning small operators is not as extensive or as reliable as the data we have concerning large operators. Accordingly, we are not requiring small operators to apply the competitive differential immediately pending our collection and

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[43] See e.g., Coalition of Small System Operators, Supplemental Information re: Programming Costs for Large Cable Operators versus Small Operators; Small Cable Business Association, Supplemental Comments in Further Support of Interim Benchmark Adjustments for Low Density and Smaller Cable Operators at 5-10.

analysis of information about costs and prices. As with other operators subject to transition treatment, however, small operators will be required to apply the full revised competitive differential unless our analysis of costs and prices demonstrates that the revised competitive differential should not be applied to them.[44]

37. Third, we are providing new guidelines with respect to the regulatory treatment of "a la carte" packages. Under the 1992 Cable Act, the rates for channels offered on a stand-alone basis ("a la carte" channels) are not regulated.[45] In our April 1993 Rate Order, we held that operators may offer subscribers discounted packages of "a la carte" channels without subjecting the package price to rate regulation as long as the channels continued to be offered on a stand-alone basis.[46] We adopted this approach in an effort to encourage increased programming choices and discounts for consumers.[47] We did not anticipate that many operators would use this technique to take channels out of regulated service tiers and offer them on an unregulated basis.[48]

38. A September 1993 Commission survey (hereinafter

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[44] Cable systems that are not required to apply the full competitive differential immediately -- either because they are owned by a small operator or because they charge relatively low prices -- may increase their rates on account of increases in external costs and improved service offerings, but may not increase rates on account of inflation, except to the extent inflation exceeds the portion of the competitive differential that the operator was not required to implement because of its eligibility for transition relief.

[45] Communications Act, Section 623(l)(2), 47 U.S.C. Section 543(l)(2).

[46] Rate Order at paras. 326-329. The Commission imposed two conditions for exempting from regulation packages of "a la carte" channels. Under the first condition, the price for the combined package must not exceed the sum of the individual charges for each component service. The second condition requires cable operators to continue to provide the component parts of the package to subscribers separately in addition to the collective offering. We have stated that the second condition would be met only when the per-channel offering provides subscribers with a realistic service choice. Id. at paras. 326-329 & n.808.

[47] See id. at para. 327.

[48] See id. at para. 328, n.808.

"Competitive Survey") reveals, however, that many operators have taken that course. Specifically, of the 25 largest multiple system operators included in the Competitive Survey, 12 removed channels previously offered on regulated program service tiers and began offering them in "a la carte" packages. Moreover, the terms and conditions of some "a la carte" packages offered following rate regulation have raised issues as to whether the option of purchasing the channels on a stand-alone basis is real or illusory.[49]

39. Accordingly, in an effort to ensure that "a la carte" offerings provide subscribers with realistic service choices and to protect against prohibited evasions of rate regulation, we are announcing interpretive guidelines for determining whether the rates for an operator's collective offering of "a la carte" channels should be regulated or nonregulated. Using these guidelines, local authorities may make initial determinations as to whether a collective offering of "a la carte" channels should be considered a regulated tier. Cable operators or consumers may then make an interlocutory appeal to the Commission of the local authority's decision. Local authorities may also request the Commission to make the initial "a la carte" decision by means of a petition for declaratory ruling.[50]

40. Fourth, we adopt a "going-forward" methodology in this Order to adjust rates when operators add or delete channels from a regulated service tier after they have become subject to regulation. Under this methodology, the efficiencies and economies of scale that arise as operators add channels to their systems are passed on to subscribers. At the same time, operators may recover the full amount of programming expenses associated with added channels, plus a markup on new programming expenses of 7.5 percent. This methodology provides a relatively simple way for operators to adjust rates. It also provides appropriate incentives for operators to provide additional, high quality programming. The going-forward methodology accordingly will promote our goals of assuring reasonable rates while

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[49] See FCC News, "FCC Issues Letters of Inquiry Concerning Cable Rate Restructuring" (released Nov. 17, 1993); FCC News, "FCC sends 35 Letters of Inquiry Concerning Cable Rate Complaints" (released Dec. 13, 1993); "FCC Sends 11 Letters of Inquiry Concerning Cable Rate Complaints" (released Feb. 23, 1994).

[50] As discussed at note 263, infra, packages of "a la carte" channels offered prior to April 1, 1993 may continue to be offered on an unregulated basis.

encouraging the continued growth of the cable industry.[51]

41. Fifth, we revise our rules to provide greater administrative relief to small systems, defined in the Act as systems with 1,000 or fewer subscribers.[52] In particular, until we develop average cost schedules for equipment, we relieve small systems owned by small operators[53] of the requirement that they establish unbundled equipment rates based on actual cost because that requirement appears to have imposed substantial burdens on small operators. Instead, eligible systems, if they so choose, may make rate reductions by reducing each regulated billed item by 14 percent (which equals the 17 percent competitive differential reduced by approximately three percent inflation that occurred between October 1992 and September 1993).[54] These systems are not required to file Form 1200. In addition, we will permit all operators of small systems[55] that do file FCC Form 1200 to aggregate their equipment costs for their small systems when establishing equipment rates. Finally, we are terminating our stay of rate regulation for small systems. We will entertain requests from small systems to extend the period of time in which they must comply with our rate regulations where they can demonstrate that specified hardship conditions exist.

42. For all cable systems subject to regulation, the rates permitted between September 1, 1993 and May 15, 1994 (the effective date of these new rules), and refund liability with respect to such rates, will be determined by our initial regulations adopted on April 1, 1993. The lawfulness of rates in effect on or after May 15, 1994, and refund liability with respect to such rates, will be determined in accordance with the revised rules adopted in this Order.

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[51] In our Cost Proceeding, we have established procedures for streamlined cost-of-service showings for upgrades and an incentive upgrade plan. We believe that these procedures also will facilitate growth of program service offerings.

[52] Communications Act, Section 623(i), 47 U.S.C. Section 543(i).

[53] For these purposes, a "small operator" is one that has 250,000 or fewer total subscribers, owns only systems with less than 10,000 subscribers each, and has an average system size of 1,000 or fewer subscribers. See discussion at para. 216, infra.

[54] Eligible small systems need not implement these streamlined rate reductions but may instead choose to establish rates under our revised benchmark approach.

[55] See infra paras. 218-221.

B. Regulation Governing Rates of Basic and Cable Programming Service Tiers

1. Background

43. After Congress deregulated most cable rates in 1984[56], the rates charged by many cable systems rose significantly. For example, the monthly rate for the most popular program tier of cable service rose by an average of 60.8 percent from November 30, 1986, to April 1, 1991.[57] Monthly rates for the lowest priced basic service tier increased by 40 percent or more for 28 percent of subscribers.[58] Although the number of channels on the average cable system also increased during the same time period, many consumers felt that the increases in their cable rates were nonetheless unreasonable.

44. Partly in response to concerns about rising cable rates, a number of economists have studied the cable industry to determine whether cable operators have significant market power. Many of these empirical studies were designed to predict the demand for cable services; others attempted to estimate the supply function for cable systems.[59] A number of the studies were conducted when cable systems had far fewer channels than they typically do today and many were based on very limited data samples. Nonetheless, while the purposes and specific results of the studies vary depending on the particular variable estimated or projected, the time period evaluated, and the variables and forms of equations used, one result is clear: the vast majority of the studies found that cable systems have some market or monopoly power and that these systems earn, or would earn in the future, monopoly profits.[60]

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[56] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

[57] See supra note 10.

[58] Cable Act of 1992, Section 2(a)(1).

[59] The demand function is the relationship between quantity of cable services consumed and price, with quantity consumed decreasing as price increases. The supply function is the relationship between quantity of cable services produced by the cable operator and price, with quantity produced increasing as price increases.

[60] See for example: Roger G. Noll, Merton J. Peck and John J. McGowan, Economic Aspects of Television Regulation (1973); G. Kent Webb, The Economics of Cable Television (1983); Eli M. Noam "Local Distribution Monopolies in Cable Television and Telephone Service: The Scope for Competition," in Telecommunications

45. The conclusion that most cable systems exercise market power was embraced by Congress when it passed the Cable Television Consumer Protection and Competition Act of 1992. Specifically, Congress found that (1) "most subscribers have no opportunity to select between competing cable systems" and (2) "without the presence of another multichannel video programming distributor, a cable system faces no local competition."[61] The

Regulation Today and Tomorrow edited by Eli M. Noam (1983), 351-416; Bruce M. Owen and Peter R. Greenhalgh, "Competitive Policy Considerations in Cable Television Franchising," reprinted in U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Telecommunications, Consumer Protection and Finance, Options for Cable Legislation, Hearings, 98th Cong., 1st Sess., (1983); 69-117; Eli M. Noam, "Competitive Entry in Local Cable Transmission," chapter 17 in Policy Research in Telecommunications edited by Vincent Mosco (1984), 190-200; Thomas W. Hazlett, "Competition vs. Franchise Monopoly in Cable Television," 4 Contemporary Policy Issues (1986), 80-97; "Opening The Broadband Gateway: The Need for Telephone Company Entry into the Video Services Marketplace," by Shooshan and Jackson, Inc., papers prepared for the United States Telephone Association (October, 1987); "Measuring Cable's Market Power: Recent Developments," Shooshan and Jackson, Inc., paper prepared for the United States Telephone Association, (December, 1988); Mark A. Zupin, "The Efficacy of Franchise Bidding Schemes in the Case of Cable Television: Some Systematic Evidence,"32 Journal of Law and Economics (1989), 401-456; Mark A. Zupin, "Cable Franchise Renewals: Do Incumbent Firms Behave Opportunistically?" 20 Rand Journal of Economics (1989), 473-482; A. B. Jaffe and D. M. Kanter, "Market Power of Local Cable Television Franchises: Evidence from the Effects of Deregulation," 21 Rand Journal of Economics (1990), 226-234; Robin A. Praeger, ""Firm Behavior in Franchise Monopoly Markets," 21 Rand Journal of Economics (1990), 211-225; Paul W. MacAvoy, "Tobin's q and the Cable Industry's Market Power," Appendix 5 to the United States Telephone Association Comments to the FCC in CC Docket 89-600 (1990); Thomas W. Hazlett, "Duopolistic Competition in Cable Television: Implications for Public Policy," 7 Yale Journal on Regulation (1990), 65-139; Stanford L. Levin and John B. Meisel, "Cable Television and Competition: Theory, Evidence and Policy," Telecommunications Policy (1991), 519-527; Robert. N. Rubinovitz, "Market Power and Price Increases for Basic Cable Service Since Deregulation," 24 Rand Journal of Economics (1993), 1-18; Thomas W. Hazlett, "Cable TV Reregulation: The Episodes You Didn't See on C-Span," Regulation (1993), 45-52. These studies are consistent with, and support, Congress' finding that operators not subject to effective competition generally exercise undue market power.

[61] Cable Act of 1992, Section 2(a)(2).

result, Congress concluded, "is undue market power for the cable operator as compared to that of consumers and video programmers."[62]

46. Congress accordingly charged the Commission with creating a regulatory scheme that will protect consumers from unreasonable cable rates until competition to or within cable services emerges and ensures that rates are set at competitive levels. Section 3 of the 1992 Cable Act provides that cable systems that face no effective competition, as that term is defined in the statute,[63] will be subject to rate regulation by their local franchising authorities and/or this agency.[64] Section 3 further instructs the Commission to ensure that the rates for basic service are reasonable and that in response to complaints, the rates for regulated upper tier cable programming services are not unreasonable.[65] And, it requires that rates for regulated cable equipment used to receive the basic tier be based on actual cost.[66] The Commission's regulations regarding basic tier rates are to "be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such system were subject to effective competition."[67]

47. In the Notice of Proposed Rulemaking ("Notice") in this proceeding, we tentatively identified a benchmark approach as the best means of implementing the rate regulation provisions of the 1992 Act. We then sought comment on several alternative bases for a benchmark, including a benchmark based on rates of systems subject to effective competition as defined in the 1992 Act, average rates of all cable systems, rates charged prior to the 1986 deregulation of the cable industry, or average costs.[68] At the same time that we issued the Notice, we selected a random sample of cable systems from which we sought information

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[62] Id.

[63] Id. at Section 623(l)(1), 47 U.S.C. Section 543(l)(1).

[64] Communications Act, Section 623(a)(2), 47 U.S.C. Section 543(a)(2).

[65] Id. at Section 623(b)(1), (c)(1), 47 U.S.C. Section 543(b)(1),(c)(1).

[66] Id. at Section 623(b)(3), 47 U.S.C. Section 543(b)(3).

[67] Id. at Section 623(b)(1), 47 U.S.C. Section 543(b)(1).

[68] Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 92-544, 8 FCC Rcd 510, 521-22 (1992).

concerning current prices, past prices, and system characteristics to aid in designing an appropriate rate regulation mechanism. We also obtained this information from a sample of systems appearing to be subject to effective competition as defined by the statute.

48. In our April 1, 1993, Rate Order, we concluded that the results of the Competitive Survey supported the findings of Congress that the rates for cable systems not subject to effective competition reflect pervasive market power.[69] We further determined that we should use a rate regulation system based on the rates of systems subject to effective competition as the principal means of setting regulated rates at reasonable levels.[70] Using the results of our Competitive Survey, we established a formula to estimate the amount by which the average per-channel rate charged by a noncompetitive system exceeded the rate that an cable system subject to effective competition with similar characteristics would charge.[71] We called that difference the "competitive differential."

49. The Commission concluded that a competitive differential of approximately ten percent exists between the rates of systems subject to effective competition and noncompetitive systems.[72] The Commission also concluded, however, that a competitive differential based on average behavior will overstate the appropriate adjustment for some systems. The benchmark approach we adopted in April 1993 sought to address this concern. Specifically, statistical analysis was used to develop a prediction of what price a noncompetitive system with a given set of characteristics would charge if it were a system subject to effective competition. This prediction was called the "benchmark." A noncompetitive cable system with rates at or below the benchmark for that system was deemed to have reasonable rates; rates above this predicted level were presumed to be unreasonable.[73] Thus, systems whose rates were at or below the benchmark were not required to make any rate reductions, although their regulated rates were capped at current levels.[74] By contrast, systems whose rates were above the

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[69] Rate Order at para. 14.

[70] Id. at paras. 205-207.

[71] Id. at para. 14, n.29; see also Appendix E.

[72] Id.

[73] Id. at para. 213.

[74] Id. at paras. 216, 232. The benchmark mechanism applied to all regulated tiers of service. Id. at para. 197.

benchmark were required to examine whether their rates were above or below the benchmark on September 30, 1992. If they were below the benchmark on that date, their permitted rate was deemed to be the benchmark. If they were above the benchmark on September 30, 1992, they were required to reduce their September 30, 1992 rates by 10 percent or to the benchmark, whichever reduction was less.[75] Alternatively, a cable operator could seek to justify rates above the benchmark level through a cost-of-service showing.[76]

50. In adopting this benchmark approach, we concluded, as we had tentatively done in the Notice, that benchmarks would "provide a simple way to ascertain on an individual system basis the extent to which rates exceed the competitive rate level," and as such, best met the statutory mandate that we reduce administrative burdens on subscribers, cable operators, franchising authorities, and the Commission.[77] We also confirmed our tentative conclusion that while the alternative cost-of-service approach to rate regulation had its advantages, its disadvantages -- which included reducing operator incentives for efficiency and improved service, and imposing heavy administrative and compliance costs upon regulators and regulatees -- were significant.[78]

51. In our First Recon. Order in this proceeding, we affirmed our decision to use a benchmark system based on rates charged by systems facing effective competition as the primary method of assessing the reasonableness of regulated cable rates.[79] While several petitioners challenged our primary reliance on rates charged by systems subject to effective competition in setting benchmark rates, arguing that we failed to take into account the other statutory factors set forth in the Act, we concluded that we properly placed primary weight on rates

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[75] Id. at paras. 217-218. The Commission reasoned that this rate reduction would allow regulators to recapture, for subscribers' benefit, the competitive rate differential that was found to exist across the industry between rates charged by systems facing effective competition and those that do not. The Commission believed that a reduction of up to ten percent for above-benchmark rates would bring these rates considerably closer to competitive levels, in accordance with Congressional intent. Id.

[76] Id. at para. 213.

[77] Id. at paras. 187-188.

[78] Id. at para. 186.

[79] First Recon. Order at para. 4.

of systems subject to effective competition in devising the benchmark approach.[80] We also explained that while we ultimately based the rate-setting methodology on the rates and other characteristics of systems subject to effective competition, we in fact took all of the statutory factors into account when developing the entire rate regulation scheme, which, in addition to the benchmark mechanism, includes cost-of-service showings and price caps.[81]

52. While we addressed certain issues regarding the benchmark approach in the First Recon. Order, we indicated that other issues would be addressed in a subsequent reconsideration order. Those issues include concerns about the accuracy of the random and competitive sample data used in constructing the benchmark, the methodology and statistical analysis used in developing the benchmark, and petitioners' recommendations that other variables be incorporated in the benchmark formula.[82]

53. The analyses and suggestions of petitioners, as well as the additional theoretical and empirical analyses conducted by our staff, persuade us that the approach that we adopted in April of last year is fundamentally sound but can be refined to improve its accuracy and better meet the goals of the statute.[83] Accordingly, we are modifying the benchmark approach in several key respects, as discussed in the following sections.

2. Impact on the National Economy

54. Before presenting our analysis of specific issues resolved in this Order, we present an analytical overview of the impact of our decisions on the Nation's economy, reviewing the likely effect of our actions on promoting innovation, investment, and growth in the cable industry.

55. We believe that the Nation will benefit from regulation that ensures the availability of cable services at competitive rates, while also ensuring that rates are not so low as to inhibit investment in new programming services and enhanced video, voice and data services in the future.

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[80] Id. at para. 12.

[81] Id. at para. 13.

[82] Id. at para 10, n.17.

[83] The specific criticisms and suggestions concerning our benchmark system that have been submitted in this proceeding are discussed in our analysis below.

56. Any discussion of the effects of cable reregulation on investment must recognize an important principle. Investment and innovation depend on two factors: (1) incentives and (2) access to capital. Both of these factors depend critically on future rates for cable services because those future rates largely determine the returns that the investments will earn. It is useful to discuss incentives and access to capital separately.

57. We believe financial incentives to invest in the cable industry depend on the prospect of future returns, which in turn depend on future demand and how rates will be regulated on a going-forward basis. Throughout this Order, we have been mindful of taking actions to ensure that the methodology to be used in determining rates following growth in programming services, channel additions or deletions, and system upgrades encourages economically efficient investment. Moreover, by limiting the extent to which operators have an opportunity to charge rates for existing services without the constraints of competition, regulation may spur cable industry entrepreneurs to devote increased effort to innovate in ways that create net economic value. We also recognize, however, that short-term investment effects of this revised approach are uncertain and depend upon cash flow and revenue analysis by individual operators.

58. With respect to the going-forward treatment of cable services, two points are of central relevance. First, those services that will be subject to continuing regulation will be allowed to earn a competitive return. For example, operators that add new channels to regulated tiers will be allowed to recover their programming costs, including a return on investment. A second key point is that many innovative new services (i.e., those offered "a la carte"[84] or not fitting within the traditional definition of cable television) will not be subject to rate regulation. For these services, market forces, rather than regulation, will drive investment decisions. Those key points -- reasonable returns on regulated investments and market returns on unregulated investments -- guide our analysis of how rate regulation will affect access to capital.

59. Some have argued that forcing cable operators to lower current rates will stifle investment by reducing the cash flows needed to finance this investment. However, we must balance this concern with the goal of establishing reasonable rates for regulated cable services. We also believe that, while investment could initially be adversely affected by the reductions in the cash flows generated by current regulated services, many

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[84] "A la carte" services are those which the subscriber purchases on a per-channel or per-event basis, such as a premium movie channel or a sports event. See Rate Order at paras. 326-329.

operators will have opportunities to generate steadily increasing cash flows from unregulated services. Operators also may have access to other sources of funding for future investments. Large MSOs in this industry historically have made extensive use of debt and equity to finance their actions. Since reregulation, credit ratings for the cable operators that have issued public debt have remained stable overall and have even improved in some instances.[85] The ability of such companies to raise investment funds in those markets is driven by the prospect of future cash flows from new investments, not simply by cash that is currently generated by past investments.[86] As one investment analyst reported, "the potential for future cable cash flow growth hinges on introduction of new services, not raising rates for basic channels."[87] We note that stock prices for the larger, publicly held cable operators increased significantly in 1993.[88]

60. Of course, higher rates for today's regulated services might well reduce the cost of borrowing to finance new investments because lenders would have greater assurance of being repaid. But any such fall in borrowing costs would not represent an increase in economic efficiency. Rather, it would simply reflect the fact that the investment risk was being placed on today's consumers of regulated cable services.

61. We also observe that parties arguing the importance of current cash flows make this argument despite the fact that many of the services that will result from these investments will be unregulated. Given the important relationship between investment and unregulated services, cable systems that now offer regulated services without being subject to effective competition, as defined in the statute, will have incentives to upgrade their

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[85] Major cable MSOs using public debt and equity include Tele-Communications, Inc. ("TCI") and Time Warner. See e.g., Standard & Poor's, Credit Week, November 22, 1993 at 84 (Continental Cablevision), October 25, 1993 at 63 (Cox Enterprises), and September 13, 1993 at 82 (Comcast).

[86] The role of current cash flows in funding investment may be more significant in the case of small operators, who face greater difficulties in obtaining access to capital. Our transition mechanism for treatment of small operators is intended to address this concern.

[87] Standard & Poor's, Credit Week, April 5, 1993 at 51.

[88] Adelphia rose 19.0 percent, Cablevision Systems 93.9 percent, Century 34.8 percent, Comcast 87.7 percent, Jones Intercable 25.5 percent, TCI 42.4 percent, yielding an average increase of 50.55 percent. Data from The Wall Street Journal, January 3, 1994.

systems with new capabilities and to introduce enhanced functions, such as interactivity, that are not subject to rate regulation. Furthermore, the revised rate regulation provisions will help prevent cross-subsidization from subscribers of regulated cable services to subscribers of unregulated services by assuring that rates for regulated services are reasonable.[89]

62. Regulation also should stimulate investment by companies that supply programming, customer premises equipment, and network equipment to cable operators. Because operators will be allowed to raise their rates based on the cost of new programming, program vendors will be able to charge market-driven prices for their services. As a result, consumer demand will determine the success or failure of new program offerings. Indeed, because regulation will constrain the power of cable operators relative to new regulated offerings, more of the gains from innovation may accrue to programmers, spurring their incentives to innovate.

63. Indeed, the going-forward methodology, our treatment of "a la carte" channels, our provisions for streamlined showings for upgrades and the incentive upgrade plan that we are establishing in our Cost Proceeding, will encourage operators to expand programming and service choices. Our going-forward methodology includes a 7.5 percent mark-up on costs of programming.[90] Our "a la carte" rules remove from rate regulation certain packages of per channel offerings where consumer benefits are likely to result.[91] The streamlined cost-of-service showing for upgrades permits operators to adjust capped rates for costs of upgrades without a review of unrelated costs.[92] And, the incentive upgrade plan contained in our interim cost-of-service order gives cable operators substantial flexibility in setting rates for new programming and new services.[93]

64. Equipment sales and investments also may be stimulated by the changes in this Order. Because the quantities of services demanded rise as prices fall, customer premises equipment sales,

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[89] The Commission has also established accounting and other safeguards to protect against such cross-subsidization.

[90] See infra para 246.

[91] See infra para. 191-197.

[92] See Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 93-215, FCC 94-38 (adopted Feb. 22, 1994).

[93] See id.

and thus investment in such equipment, could ultimately increase due to the lower prices that operators are forced to charge for regulated services. Reregulation also will provide investment incentives for the firms that provide plant and equipment to the cable operators themselves. The same forces identified above as creating incentives for cable operators to invest in unregulated markets -- the prospect of earning a market return -- could also create incentives for their equipment suppliers to make investments.

65. Reregulation also should stimulate demand for network equipment. In 1993, industry observers forecasted that construction spending would increase to $2 billion from its 1992 level of $1.3 billion.[94] Measured in terms of percentage growth, cable operators have become the most aggressive purchasers of fiber optic equipment in the telecommunications industry.[95] The National Cable Television Association (NCTA) recently estimated that $14 billion will be spent over the next ten years to rebuild 75 percent of the Nation's cable systems, including heavy investment in fiber optic equipment.[96]

66. We further believe that the new and revised rules we adopt in this Order will decrease the regulatory risk faced by investors in the cable industry. By creating an uncertain environment, unstable or ever-changing regulations can discourage investment. We continue to believe that it is important to have a stable and predictable regulatory scheme and that the rules adopted today establish such a system as a transition to competition and, when appropriate, deregulation. Such regulation should also help stimulate construction of advanced networks that will become key links in the national information infrastructure.

3. Estimating the Competitive Differential

67. As noted, throughout our regulatory process we have been mindful of promoting innovation, investment and growth in the cable industry while at the same time ensuring reasonable rates for regulated services. Estimating the competitive differential requires an analysis of the difference in rates charged by noncompetitive cable systems and cable systems subject to effective competition. In this section we consider our specific methodology for calculating the average competitive differential based on the results of our Competitive Survey that

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[94] Paul Kagan Associates, Cable TV Financial Data Book, 1993, at 9.

[95] Department of Commerce, U.S. Industrial Outlook 1994 at 30-15.

[96] See USA Today, November 4, 1993 at 1-B.

we conducted as part of our initial implementation of the Cable Act.[97]

68. In our April 1993 Rate Order, the Commission used regression analysis to compare the rates charged by cable systems that were not subject to effective competition and those Congress had defined as being subject to effective competition: i.e., low-penetration, overbuild, and municipal systems.[98] In our Competitive Survey of September 30, 1992 cable rates, we evaluated as one group the entire competitive sample. That is, we combined all the data from the three types of systems subject to effective competition rather than evaluating each of the three types of systems separately. Using that approach, we found the average competitive differential -- the average difference in rates charged by systems subject to effective competition and those not so subject -- to be ten percent.[99] As a practical matter, that figure gave primary weight to the data from low penetration systems because they constituted more than half of the data sample of systems subject to effective competition.[100]

69. Questions had been raised concerning the propriety of using the low penetration systems in our analysis, and the exclusion of these systems would have had a significant effect on the competitive differential under the benchmark methodology adopted at that time. In fact, when the low-penetration data were deleted from the group and the competitive differential was estimated based on the overbuild and municipal systems data alone, the competitive differential was found to be 28 percent.[101]

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[97] The Competitive Survey was described in Appendix E of the Rate Order.

[98] See Communications Act, Section 623(1)(1), 47 U.S.C. Section 543(1)(1).

[99] Rate Order, at para. 14 and Appendix E. Some petitioners contend that the Commission erred by using the average rates of systems subject to effective competition when developing the benchmark formula. The Commission rejects the argument the Commission erred in adopting a benchmark that is based on the average rate charged by competitive systems. We believe a benchmark based on an average competitive system combined with the opportunity to justify a higher rate in a cost-of service proceeding is most likely to ensure reasonable rates for systems not subject to effective competition.

[100] There were 79 low penetration systems, 46 overbuilds and 16 municipals in the database used in the Rate Order analysis. Id., Appendix E at para. 11.

[101] Id., Appendix E at para. 30.

We therefore issued a Further Notice with the Rate Order in which we requested comment on (1) whether the exclusion of low penetration systems would produce a better measure of the competitive differential, and (2) whether we should, and lawfully could, include within the data upon which the competitive rate differential is determined, only the rates of overbuild and municipal systems.[102]

70. In our Second Report and Order, we concluded that we were required to consider all three types of systems subject to effective competition, as defined by Section 623(l)(1) of the Communications Act, 47 U.S.C. Section 543(l)(1), in crafting our benchmark system.[103] Accordingly, we concluded that data from cable systems with less than 30 percent penetration should continue to be included in the sample of systems used to assess the reasonableness of cable rates.[104] In addition, we stated that it would not serve the public interest to exclude low penetration systems merely because such an exclusion would result in larger rate reductions.[105] We also decided to continue to include municipal and overbuild systems in the sample of systems used to assess the reasonableness of cable rates both because Congress defined those types of systems as being subject to "effective competition" and because economic analysis indicates that data from these systems are relevant to this assessment.[106]

71. Our decision to include low penetration systems in the competitive sample used to calculate the competitive differential has been challenged on reconsideration by NYNEX.[107] In addition, numerous other petitioners have raised questions concerning our

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[102] Id. at paras. 561-563.

[103] Second Report and Order at paras. 128-131.

[104] Id. at para. 128.

[105] Id. at para. 130.

[106] Id. at para. 131.

[107] In particular, NYNEX asserts that excluding low penetration systems would not require the Commission to redefine "effective competition." Rather, NYNEX claims, "effective competition" is only relevant to one out of the seven criteria in Section 623(b)(2)(C) of the Communications Act of 1934, as amended. NYNEX Petition for Reconsideration at 2-3. Several parties filed comments supporting (GTE, State of Connecticut, Office of the Attorney General) and opposing (Cablevision, Viacom, Time Warner and Continental) the NYNEX petition.

underlying economic and statistical methodology.[108] In response to those concerns, and based on our own further analysis, we have refined our method of computing the competitive differential. As described below, we have: (1) disaggregated our analysis of the three types of systems subject to effective competition to achieve a better understanding of the differential between these systems and those in our noncompetitive sample; (2) improved the variables used in our statistical analysis of the competitive differential; and (3) tested whether additional variables should be included in our regression analyses to account for the effects of cost and demand differences that our initial statistical estimation may not have fully captured.

a. Disaggregated Treatment of Low Penetration, Overbuild, and Municipal Systems

72. The competitive differential in the Rate Order was a single number (9.4%) based on the difference between the rates of systems in the Commission's random sample of noncompetitive cable systems and the rates of low-penetration systems, overbuilds, and municipal systems.[109] Because the competitive differential in the Rate Order was a single number calculated from the rates of all systems in the sample that were thought to be subject to effective competition, it reflected the relative number of cable systems in each of the three categories subject to effective competition. We recognize, however, that the three portions of the competitive sample -- low-penetration systems, overbuilds, and municipals -- have very different characteristics. In addition to reviewing the definitions of the three types of systems, it thus is useful to consider some of the characteristics of each.

73. Low-penetration systems are those whose subscribers comprise less than 30 percent of the households in the franchise area.[110] The question of whether the entire franchise area was wired for cable service was not considered in defining low penetration systems for purposes of the competitive sample. Thus, this definition of "penetration" does not conform to the standard industry definition of penetration as the ratio of subscribers to homes passed by cable wire. Rather, some of the systems in our sample are considered low penetration systems even though a very high percentage of the homes passed by cable wire subscribe, since such a system may be considered a low

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[108] Specific challenges are addressed in the technical appendix to this Order.

[109] Rate Order, Appendix E at para. 29.

[110] Communications Act, Section 623(l)(1)(A), 47 U.S.C. Section 543(l)(1)(A)

penetration system if a large portion of the franchise area is not wired.

74. The second statutory category, overbuild systems, occurs in markets where two or more cable systems or multichannel video providers each make its service available to at least 50 percent of households in the franchise area. In order to be considered an overbuild, more than 15 percent of households in the franchise area must subscribe to services provided by other than the operator with the largest share of the subscribers within the franchise areas.[111] To meet the statutory definition, however, it is not necessary for the cable systems actually to compete head-to-head by offering their service to all of the same potential subscribers.

75. The third statutory category, municipals, includes both cable systems owned by municipal authorities and privately-owned cable systems in franchise areas where the franchising authority itself operates a cable system offering service to at least 50 percent of the households in the franchise area.[112] This part of our competitive sample consists of pairs of cable systems, one publicly-owned municipal system and a privately-owned system that competes with it, serving the same franchise area. All but one of these pairs meet the criteria for the "overbuild" category as well as the "municipal" category.[113]

76. In response to petitioners' concerns regarding the validity of our statistical approach to the analysis of the competitive sample, we have conducted a more refined analysis. This revised analysis indicates that the competitive differential varies widely across the three types of systems defined as subject to effective competition. Moreover, we found these differences to be statistically significant.[114] Accordingly, we

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[111] Id. at Section 623(l)(1)(B), 47 U.S.C. Section 543(l)(1)(B).

[112] Id. at Section 623(l)(1)(C), 47 U.S.C. Section 543(l)(1)(C).

[113] The remaining pair does have two operators in the same franchise area, but the private operator does not meet the statutory overbuild criterion because its subscribers do not constitute at least 15 percent of the households in the franchise area.

[114] Specifically, we applied an F test, a standard test of the equivalence of several parameters, to the variables representing the three competitive samples. They proved to be statistically significantly different at much better than the 1 percent confidence level.

find that instead of computing the competitive differential by analyzing collectively the rates of all three types of systems in our competitive sample, it is most appropriate to estimate a separate competitive differential for each of the three classes of systems.

b. Improved Variables

77. In revising our methodology to determine reasonable cable rates, we also have improved several other aspects of our analysis.

78. First, we have refined our measure of the price of regulated cable service. Instead of measuring rates as monthly revenue per subscriber per channel, we now measure rates as monthly revenue per subscriber. Our analysis shows that the price of cable service increases only a small amount as the number of channels included in regulated tiers of service increases. Moreover, subscribers actually purchase regulated service not on a per-channel basis, but in tiers consisting of several channels. Revising the price variable in this way thus better reflects consumer demand and improves the quality of the statistical analysis.[115]

79. In addition, we have strengthened our measure of overbuild competition. First, we have added to the overbuild sample those municipal-category cable systems that also meet the overbuild criteria. Second, because the extent of actual competition is limited in many franchise areas classified as having overbuilds, we have refined the overbuild variable to measure the extent of system-overlap competition rather than simply adopting a variable that only indicates whether or not there is any competition from another cable system. We expected and found that the effect of competition on a system's prices would be greater the larger the fraction of households in the system's service area that are subject to actual head-to-head competition.

80. The staff also detected and corrected numerous errors in the data, based on their own checks of the data and errors reported by commenters, cable systems, and users of the data. When apparent errors were found, correct information was obtained from cable systems and entered into the database.

c. Tests for the Effects of Cost and Demand Differences

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[115] We have also improved the measure of equipment and installation revenue that enters into the measure of revenue per subscriber, as described in the Technical Appendix.

81. Some petitioners claim that in the original analysis of cable rates, we failed to consider important characteristics of cable systems that might have affected their rates.[116] Controlling for such variables is important because, if competitive systems generally differ from noncompetitive systems in some characteristic that affects rates, failing to account for that characteristic in the analysis will distort the results, giving a biased estimate of the effect of competition. Suppose, for instance, that competitive systems had higher density (subscribers per mile) than noncompetitive ones, and that higher densities were associated with lower rates. In such a situation, failing to control for differences in density would cause competition to appear to reduce rates more than it actually does. Given the additional time to analyze our data on reconsideration, we have had an opportunity to control for more characteristics that may affect rates and to arrive at a more accurate estimate of the competitive differential.

82. In our recent analysis of the data we incorporated several variables that were not included in the original benchmark regressions. Among the variables used in the equation were measures of the numbers of channels of various types.[117] We found that rates increased as (1) the number of channels increased, and (2) as the percentage of channels available only on cable (i.e., non-broadcast channels) increased. The number of local broadcast channels carried was expected to measure competition from local broadcast stations and was expected to have a negative effect on rates; however, it did not prove to be statistically significant.[118]

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[116] See Charles River Associates' "A Further Analysis of the FCC's Cable Television Benchmark Rates" at 8 (submitted with Tele-Communications, Inc. Petition for Reconsideration)("Charles River Study"); Liberty Media Corporation Petition for Reconsideration at 12-13; Coalition of Small System Operators Petition for Reconsideration at 10, Community Antenna Television Association Petition for Reconsideration at 8; King County, et. al. Petition for Reconsideration at 10.

[117] The exact form of the variables used is presented in the Technical Appendix.

[118] Several petitioners for reconsideration contend that the use of the satellite variable in determining a cable operator's benchmark rate unreasonably discriminates against program suppliers that do not use satellite technology. See e.g., Atlanta Interfaith Broadcasters Petition for Reconsideration at 10-12; Video Jukebox Network Petition for Reconsideration at 3-5. Some also state that the use of the number of satellite channels as a variable discourages the carriage of local-interest programming and thus favors certain speakers in violation of the First

83. We also considered measures of the quantities of optional services purchased by customers, including numbers of additional outlets, converter boxes, addressable converters, remote controls, tier changes, installations, and upper tiers of service.[119] These variables, which were all measured on a per-subscriber basis, were examined to improve the measure of the

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Amendment. Northland at 2-3, Video Jukebox Network at 7-8. The Commission does not believe that the satellite channel variable violates the First Amendment since (1) the variable reflects the fact that competitive systems' prices vary along with the percentage of non-broadcast channels and (2) it is entirely appropriate to reflect cost differences in the benchmark. Nonetheless, the Commission has responded to petitioners' policy concern by replacing the satellite channel variable with a percentage of non-broadcast channels variable.

Other petitioners argue that cable operators should not be allowed to include menu, directory, or other so-called "barker" channels in their channel count on regulated tiers for purposes of determining benchmark rates. National Association of Telecommunications Officers and Advisors (NATOA) Petition for Reconsideration argues that cable operators should be prohibited from recovering a per channel cost for such low cost channels. NATOA at 33; King County, et. al. Petition for Reconsideration at 11. King County contends that the sole purpose of barker channels is to sell premium and pay-per-view services and, thus, these channels do not provide service to subscribers who desire only basic or expanded tier service. Moreover, this petitioner suggests that cable operators receive at least implicit payment for carriage of the barker channels because such channels promote increased use of premium and pay-per-view channels. King County at 11. NCTA responds that menu channels provide a valuable service and that lower cost channels are balanced by higher than average cost channels. NCTA Opposition to Petitions for Reconsideration at 12, see also Prevue Networks, Inc. Opposition to NATOA Petition for Reconsideration at 2 (useful service), Time Warner Entertainment Company, L.P. Opposition to Petitions for Reconsideration at 3 (benchmark is an average rate). After considering these arguments, we affirm our decision not to become embroiled in regulating the content of channels for purposes of rate regulation. See Form 393, Part II, Line 102 Instructions. Accordingly, the Commission will continue to count all types of channels in the "number of regulated channels" variable.

[119] Addressable convertors allow the cable operator to communicate with an individual subscriber's cable box via the cable wire. This allows the cable operator to block out or unblock a channel, such as a pay-per-view channel, without sending out a service technician. Tier changes refer to customers adding or deleting a tier of channels to their service.

competitive differential by ensuring that it reflected price differences rather than differences in the levels of service consumed. Increases in the percentages of customers purchasing remote controls, additional outlets, upper tiers of service, and tier changes all were associated with increases in revenues per subscriber.

84. Other variables were considered to reflect costs of providing service, including the number of subscribers to the system. As expected, rates per subscriber declined as the number of subscribers increased because fixed costs could be spread over more customers. Construction costs were represented by various measures of miles of plant (i.e., cable wiring), miles below ground, miles of fiber plant, and whether a system was required to bury cable drops.[120] These variables were not statistically significant and were dropped from the analysis. At several points in the analysis, various measures of density were tested and never proved to be statistically significant. Whether a system was owned by a multiple system operator (MSO) was included in the expectation that economies of joint ownership might exist. Surprisingly, systems that were owned by an MSO had higher per-subscriber revenues than those that were not. In addition, we expected that high wage rates would raise system costs. Median income in the franchise area was used as a proxy for wage rates,[121] and median income was positively related to revenue per subscriber.

85. Contrary to claims of some petitioners,[122] we also do not believe that the benchmark is flawed because it does not account for differences in individual system costs. The regression analysis performed has identified the statistically significant determinants of average revenue per subscriber. Some

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[120] This is discussed in detail in the Technical Appendix.

[121] Income data by zip code area were obtained from the Bureau of the Census and merged with the cable survey data base. We considered whether the inclusion of the income variable could reflect demand effects (higher prices reflecting higher demand in higher income areas) rather than cost effects (higher prices reflecting higher costs in higher income areas). To study this, we tested for the possible impact of simultaneous equations bias between supply and demand effects. This test results in an income coefficient that is almost identical to our regression estimate (.070 versus .069), indicating that our estimated coefficient primarily reflects cost effects rather than demand effects. See Technical Appendix at 16-17, 24-25.

[122] See e.g., King County Reply to Oppositions at 2-4; Century Petition for Reconsideration at 2-6, Wometco Petition for Reconsideration at 7-8; see also First Recon. at para. 13.

of these are cost-related, some may reflect demand factors, and some may embody both demand and cost factors. The data did not allow us to isolate a statistically significant relationship between costs and prices so as to permit us to craft a cost-based benchmark.[123] Cable systems retain the option to initiate a cost-of-service proceeding if they believe that the benchmark fails to provide them with a reasonable return. We also note that in our Cost Proceeding, we are examining the use of average cost schedules to set regulated cable rates which should provide an approach to setting rates that is similar to a cost-based benchmark.

d. System Size and the Competitive Differential.

86. Several petitioners conducted analyses of the Commission's cable Competitive Survey data that could be interpreted as demonstrating that the competitive differential varies with system size and that the competitive differential is not statistically significant for systems larger than 5,000 subscribers.[124] These commenters failed to offer an explanation of why it is appropriate to break up the sample at this point, why such an effect might be expected to occur, or why we should take it into account in formulating policy.

87. We believe that to some extent the failure to find a significant competitive differential in the analyses of a reduced sample comprised solely of larger systems stems from inaccurate measurement of the degree of competition. First, inclusion of low penetration systems in the competitive sample, even though they appear to behave no differently from noncompetitive systems, caused the estimate of the competitive effect to be smaller and less statistically significant for systems of all sizes. In other words, were it not for the disproportionately high number of low penetrations systems in the competitive sample, the competitive differential would have been larger for systems of all sizes.

88. Second, the apparent lack of a significant competitive difference in the rates of larger systems may have resulted from measuring competition on a franchise area basis when many systems charge uniform prices for all franchise areas in the system.

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[123] This reflects the fact that operators did not in response to the initial Notice in this proceeding or in our Cost Proceeding provide sufficient information for us to establish a cost-based benchmark of the type sought by some operators.

[124] NCTA Petition for Reconsideration at 15, Time Warner Entertainment Company, L.P. Petition for Reconsideration at 3 (above 10,000).

Using the system overlap measure of competition, described above,[125] which we believe more accurately captures the extent of competitive pressure on prices, we tested for the extent to which prices varied with system size for competitive and noncompetitive systems. And we used a procedure that does not arbitrarily divide the sample at 5,000 subscribers. Using this procedure, we found that the effect of system size on the competitive differential is not significant. This finding supports the conclusion that a single competitive differential is appropriate for systems of all sizes.

89. We also considered another statistical approach that yielded different competitive differentials for systems of differing sizes. This approach leads to the conclusion that the rates charged by cable operators that are subject to competition rise to the level of noncompetitive ones as the number of subscribers increases. To draw policy conclusions, one must understand the source of any relationship between system size and the magnitude of the competitive differential. One possible explanation for why the competitive differential may be smaller for larger systems is that larger competitive systems are more sophisticated and may thus have learned to collude more effectively. To the extent that this explanation is valid, it suggests that the larger competitive differential exhibited by smaller systems more accurately represents the effect of competition. This logic would suggest that we apply the larger competitive differential derived from smaller systems to all systems, regardless of their size. Nevertheless, given the relatively small number of observations in the competitive sample, we believe that dividing the data into smaller and smaller samples is statistically risky, and that a competitive differential estimated on the basis of the three types of systems subject to effective competition is more likely to yield an accurate measure of competition.

e. The New Competitive Differential

90. Our statistical analysis of the Competitive Survey indicates that the competitive differential is 1 percent for the low penetration sample, 16 percent for the overbuild sample, and 37 percent for the municipal sample. These three numbers serve as the fundamental components of the Commission's derivation of an appropriate composite competitive differential for application to the rates of regulated systems. In deriving a single competitive differential, the Commission is compelled to exercise its judgment and expertise, taking into account the factors identified by Congress in the Cable Act. In so doing, the Commission is especially guided by (1) the Act's requirement that in promulgating rate regulations the Commission is to take into account or consider, inter alia, the rates charged by systems

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[125] See supra para. 79, see also infra para. 97.

subject to effective competition[126] and (2) Congress's finding that "without the presence of another multichannel video programming distributor, a cable system faces no local competition," resulting in "undue market power" for the cable operator.[127]

91. In determining a single composite competitive differential to apply to regulated systems, we believe the Cable Act of 1992 requires us to take into account all three categories of cable systems that Congress defined as being subject to effective competition. For that reason, we deny NYNEX's petition for reconsideration of our Second Report and Order. That petition urges us to exclude low penetration systems from the competitive sample. In considering the rates of the three types of systems, however, we believe it is appropriate and informative to assess the extent and nature of competition faced by each of the three classes of systems that Congress has deemed to be subject to effective competition.

92. As noted, low penetration systems' rates did not differ substantially from the rates of systems in the random sample not subject to effective competition. While low penetration may result from sharing a market with a competitor, it may also result from a number of other conditions not related to competition. For example, a new system that has just begun operation or a system that serves a low income neighborhood may have low penetration. A system with high prices or poor service also may have low franchise area penetration as a consequence.

93. In conducting our data analysis, we made a number of attempts to isolate these various factors and their potential effects. Regressions were run to examine the effects of consumer income levels, the extent to which a system serves an urban population (in an attempt to capture the effects of local competition from other forms of entertainment), the age of the system, and the number of broadcast television channels in the service area. None of these attempts was successful in identifying a statistically significant effect, leaving us unable to conclude that the rates set by low-penetration systems (other than those that also are overbuilds or municipal systems) are likely at or near competitive levels.

94. Furthermore, the statutory definition of low penetration is based on homes in the franchise area, not homes passed by the cable system. Yet cable systems frequently offer service to only a portion of the franchise area. Indeed, it is possible that,

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[126] Communications Act, Sections 623(b)(2)(C)(i), 623(c)(2)(B), 47 U.S.C. Sections 543(b)(2)(C)(i), (c)(2)(B).

[127] Cable Act of 1992, Section 2(a)(2).

under the statutory definition, a system could have low penetration simply because it is redlining (i.e., choosing to offer service in only part of its franchise area). When measuring the choices available to potential subscribers, penetration might better be measured on the basis of homes passed rather than franchise area homes. Hazlett has examined the franchises in the low penetration sample and found that a significant minority of them in fact exhibit greater than 30 percent penetration of homes passed.[128] Our own data analysis reaches a similar conclusion.

95. Previous studies of cable industry market power conducted by outside experts and academics have focused on overbuilds as representing competition because they are engaged in head-to-head competition. We agree that overbuilds come closest to facing competition and thus charging reasonable rates, although interpretation of the overbuild results must be guided by analysis of the other two types of system deemed by Congress to face effective competition.

96. There were 41 overbuild systems in our sample -- 51 when the overbuild municipals are included. As noted above, it is not necessary for overbuild systems to actually compete head-to-head across their service areas in order for them to qualify as overbuilds under the statutory definition. However, our analysis of the Competitive Survey data reveals that there is extensive head-to-head competition in many instances. While this situation is closer to the concept of robust and vigorous competition than is the situation of a low-penetration system, we still believe that we must also consider other factors that will reflect aspects of a competitive marketplace.

97. As explained more fully in the Technical Appendix, we corrected statistically for the fact that most overbuilds do not entail full head-to-head competition. We were able to do so because the amount of head-to-head competition varies among the overbuilds in our sample and the rates charged by cable companies decrease as the amount of head-to-head competition increases. Accordingly, we calculated a revised competitive differential of 16 percent for the overbuild systems in our sample. We regard that figure as superior to the 12 percent figure derived from the data without correction for the lack of full head-to-head competition.

98. Many petitioners agree that the rates charged by

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[128] See Affidavit of Thomas W. Hazlett, appended to Joint Comments of Bell Atlantic, GTE, and the NYNEX Telephone Companies in Response to the FNPRM (June 17, 1993).

overbuild cable systems reflect competitive behavior.[129] Indeed, petitioners also urge us to rely primarily on these rates for purposes of determining the competitive differential.[130] There are, however, two concerns with the use of the overbuild competitive differential as the measure of the overall average competitive differential. One point argued by some petitioners is that overbuild operators may set prices below their average total costs (i.e., below the costs that include a return on capital), particularly during the early stages of overbuild competition. Petitioners suggest, for example, that the competitive rivalry between two cable competitors in the same franchise area leads to unsustainable price cuts or "price wars," during which services are priced below cost.[131] William Shew, on behalf of Harron Communications, argues specifically that overbuilds that have been in existence for less than five years are not a reliable indicator of competitive prices because they engage in price wars. As evidence of this, Shew states that the overbuilds in the FCC database that have been in existence for less than five years charged rates that are 25 percent lower than those overbuilds where competition endured for more than five years. Shew argues that rates charged by overbuilds in existence more than five years are reliable measures of competitive rates because prices have stabilized.[132]

99. As we stated in the Second Report and Order, there is nothing in the record to support the contentions that overbuild systems of any particular age are charging rates that do not allow them to recover costs or otherwise provide for viable operation.[133] Even if Shew is correct that new overbuilds charge

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[129] See e.g., GTE Opposition at 6-10; King County et. al. Opposition to Petitions for Reconsideration at 6-10.

[130] See e.g., Consumer Federation of America Comments at 7 (June 17, 1993); Maryland People's Counsel Reply Comments at 2.

[131] See e.g., Bank of New York Petition for Reconsideration at 3, Booth American Company, et. al. Petition for Reconsideration at 11, Coalition of Small System Operators Petition for Reconsideration at 7, CATA Petition for Reconsideration at 16-17, Liberty Media Corporation Petition for Reconsideration at 11, NCTA Petition for Reconsideration at 11, Northland Communications Corporation Petition for Reconsideration at 15, Stanley M. Searle Petition for Reconsideration at 2-3, Wometco Cable Corp., et. al. Petition for Reconsideration at 3, Harron Communications Corp. Petition for Reconsideration at 2.

[132] Harron Communications Corp. Petition for Reconsideration 13-14.

[133] Second Report and Order at para. 131.

lower rates than more mature overbuilds, he presents no evidence that the newer systems are failing to earn a profit or will be unprofitable in the long-run. Equally important, the behavior cited by Shew is equally consistent with the well-established body of economic evidence showing that firms that face one or at most a few competitors may eventually collude and collectively raise prices rather than compete with each other.[134]

100. Thus, the second concern about the overbuild competitive differential is that it is smaller than one that would be generated by vigorous competition. Several market conditions indicate that cable overbuilds would be expected to charge parallel or coordinated rates successfully. First, there typically are only two cable operators in a given overbuild franchise area. Second, operators can observe one another's marketing efforts and thus respond quickly to deviations from an implicit agreement. Third, operators do not enter into long-term contracts with their subscribers, so that if one operator deviates from implicit parallel rates, the other operator can retaliate to take the customers back, thereby lowering the profitability of a practice that would deviate from the coordinated, parallel rates. Finally, cable operators are not dealing with large, organized customers who might otherwise be expected to exercise buyer power.

101. Both the "price-war" and the "parallel or coordinated pricing" scenarios predict that competitive differentials should fall as the length of time during which the systems have been in competition with one another rises. Statistical analysis of the data show that the competitive differential falls over time. In particular, various exploratory regressions show that operators in young overbuild situations price as much as 25 percent less than operators in the noncompetitive sample, while systems that have been in competition five years have a competitive differential of approximately 17 percent, and by some measures the competitive differential falls to ten percent or less after an even greater number of years. While they are informative, no one number is definitive because each is derived by taking the overbuild subsample and dividing it further. From this regression analysis and our examination of the industry structure, we believe that estimates of ten and 12 percent for the competitive differentials are clearly too low due to the effects of parallel or coordinated pricing, and the true average competitive differential is substantially higher. At the same time, this analysis leads us to conclude that these effects are unlikely to push the true differential much higher than 20 percent. Consequently, our best estimate of the average competitive differential starts with the overbuild coefficient

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[134] F. Scherer and D. Ross, Industrial Market Structure and Economic Performance (1990) at 226.

from the benchmark regression of 16 percent and is adjusted slightly upwards.

102. The municipal sample clearly demonstrates the lowest rates, with an estimated competitive differential of 37 percent. Our sample of municipal systems consists of 11 systems, 10 of which also qualify as overbuilds. In light of the possibility of tacit coordination between oligopolists discussed above, and the likelihood that government authorities are less inclined to participate in such practices, the systems in the municipal subsample might be thought to present the best measure of competition.

103. However, we find there are several concerns with the municipal sample. First, the municipal sample contains only 12 operators. We raise this concern both in the statistical sense of using a small sample, and because it demonstrates that the universe of municipal systems is itself small and thus, in some respects, unusual as compared to other competitive systems. Petitioners have also raised concerns that the very low rates charged by municipally-owned systems reflect "unfair" competition. They suggest that municipalities have lower costs than privately-owned systems, are willing to accept losses, and may be subsidizing the provision of cable service from other revenues.[135] The National Cable Television Association (NCTA) attempted to support these contentions with studies showing that a few municipal systems were subsidized or not making a profit.[136] However, these municipal systems responded that the information and assumptions used in the studies were not accurate and that NCTA's conclusions were unfounded.[137]

104. Because of these concerns about municipally owned systems, we turned our attention to the private systems that compete against municipally run systems. Analysis revealed that the competitive differentials for private and municipal systems do not differ from one another by a statistically significant amount. In every instance, however, the municipal system was built after the private system had been operated for some portion of time, and several of the municipals appear to be quite new. Thus, we cannot be sure that the privately operated systems are

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[135] See e.g., CATA Petition for Reconsideration at 17-18, NCTA Petition for Reconsideration at 12-14, Harron Communications Corp. Petition for Reconsideration at 3, Wometco Cable Corp., et. al. Petition for Reconsideration at 3.

[136] NCTA Petition for Reconsideration at 12-14.

[137] Michigan Communities Opposition to Petitions for Reconsideration at 21-27; King County et. al. Opposition to Petitions for Reconsideration at 17.

continuing to cover their investment costs at the current prices.

105. After reviewing the disaggregated data from all three types of unregulated systems, we have decided that we should give the most emphasis to the data relating to overbuilds. After doing so, we have selected 17 percent as the revised competitive differential. In selecting that figure, we were guided by the 16 percent competitive differential estimated from our data on overbuilds to reflect full head-to-head competition. We adjusted upward from 16 percent on account of our conclusion that cable operators facing competition may engage in parallel or coordinated pricing over time. We also considered the 37 percent competitive differential for municipal systems but discounted this factor somewhat because of the small number of municipal systems and on account of our consideration of low penetration systems, which had only a one percent competitive differential. Our decision to adjust upward was also influenced by our conclusion that any cable operators that would be harmed by applying the competitive differential because analysis of their costs and revenues shows that they do not fully exercise their market power may invoke our cost-of-service rules.

4. Applying the Competitive Differential

106. The April 1993 Rate Order required some, but not all, noncompetitive cable operators to lower their rates to avoid refund liability. In particular, only those regulated operators with very high rates were required to come down ten percent. Operators with rates less than ten percent above the benchmark were required to reduce their rates only to the benchmark which was the average per-channel rate charged by similar effectively competitive systems in our rate sample. Those cable operators with rates below the benchmark were not required to reduce their rates at all.[138] This approach reflected concern that an average adjustment factor applied to all regulated cable systems would be too high for some systems (i.e., those for which the differences between revenues and costs were relatively small). Because the approach focused solely on the revenue part of the difference between revenues and costs, an implicit assumption of this approach was that all cable operators' costs are similar, so that only high subscriber rates reflect the exercise of market power. Expressed somewhat differently, this approach gave weight to the argument that only those cable operators with high rates were charging subscribers too much.

107. We believe that profit-maximizing cable operators, whether they are subject to competition or are noncompetitive, set their prices based on costs and subscriber demand. Without more detailed information on the cost and demand conditions

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[138] Rate Order at para. 216.

facing a particular cable operator, however, it is impossible to determine the amount by which that operator's revenues exceed its costs. A cable system may have a small degree of market power yet still charge a high price because its costs are high.[139] Likewise, a cable system may have a large degree of market power yet still charge a low price because its costs are relatively low. Given the absence of industry-wide data, we have not been able to identify the underlying cost and demand factors with sufficient precision to allow us to construct an estimate of market power on a system-by-system basis. Furthermore, we believe that our refined statistical analysis indicates that behavior reflective of market power may exist generally within the noncompetitive sector of the cable industry, rather than just with systems charging relatively higher rates.

108. This finding is consistent with the numerous other studies performed over the years.[140] We have reviewed many studies of market power of cable systems conducted by the Commission and independent market analysts. Based on these studies, there seems to be relatively little disagreement among economists that noncompetitive cable companies possess market power.

109. For these reasons, we have concluded that it is preferable to apply the same percentage adjustment to all regulated cable systems rather than to attempt to assign different adjustments to different systems. Thus, as a general matter, to avoid refund liability, regulated cable systems will be required by May 15, 1994 (the effective date of the modified rules) either to set their rates so that their regulated revenues per subscriber do not exceed September 30, 1992 levels reduced by the revised competitive differential of 17 percent[141] (with

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[139] See Supplemental Comments in Further Support of Interim Benchmark Adjustments For Low Density and Smaller Cable Operators (Small Cable Business Association) at 7-10.

[140] See supra note 60. While these studies support our conclusion and are consistent with our actions, we are not relying on these materials for our decisions.

[141] As discussed below, we will provide a limited exception to this requirement for cable systems that are unable to bring their regulated rates into compliance with the revised benchmark rules by May 15, 1994. As long as such a system does not increase any rate component for regulated service or equipment and does not engage in rate or service offering restructuring (by, for example, moving channels out of a regulated service tier) following the release of this Order, the system may take up to an additional 60 days beyond May 15, 1994 (i.e., by July 14, 1994) to bring its regulated rates into conformance with the

certain adjustments described below), or to submit a cost-of-service showing supporting higher rates.[142] At the same time, our analysis persuades us that there are two limited classes of operators that should not be required to adjust their rates in this manner until we develop a better picture of the price/cost profiles of these operators. The requirement to set rates according to the general rule thus will not apply to regulated cable systems that fall into one of two categories of systems eligible for transition relief.

110. The first category eligible for transition relief consists of systems owned by "small operators," a term defined below as cable operators which have a total subscriber base of 15,000 or fewer customers and which are not affiliated with a larger operator. The second category consists of (i) systems whose March 31, 1994 rates are at below the revised benchmark and (ii) systems whose March 31, 1994 rates are above the benchmark but whose permitted rates are at or below the benchmark.

111. Systems eligible for transition relief will not be required to make the full reduction otherwise required until the Commission has collected and analyzed data about such operators' prices and costs, and determined whether such a reduction is not inappropriate. We anticipate that some of these price/cost data will be collected through a cost study to be conducted by

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revised standards without incurring refund liability. See infra note 42.

[142] Cable systems that previously elected the benchmark approach to rate-setting under the initial rules may justify their rates under the new rules using either the revised benchmark approach or a cost-of-service showing. However, consistent with our rules requiring systems to use a uniform approach to rate-setting among regulated tiers, the system must apply the same rate-setting methodology to justify rates for both the basic and cable programming services tiers. See Third Report and Order at para. 9. Thus, for example, if the system elects to use the benchmark approach to support its rates for basic service, it must also use the benchmark system to justify rates for its upper regulated service tiers.

We also remind operators choosing to make a cost-of-service showing that their rates will be set at the level justified by those costs, even if that level is below the rates to which they would have been entitled had they used the benchmark system. See Rate Order at para 272.

Commission staff over the next six to nine months,[143] while other data will be submitted to the agency by the affected cable systems in a proceeding on this issue to be initiated shortly. The relevant price/cost data then will be aggregated and analyzed so that they can be applied on an industry-wide, rather than a system-by-system, basis.[144] At the conclusion of our analysis, systems eligible for transition relief will be required to make the full reduction unless the analysis reveals that application of the 17 percent competitive differential to these systems is inappropriate.[145]

112. For all cable systems subject to regulation, the rates permitted for the period from September 1, 1993 until May 15, 1994 (the effective date of these new rules), and refund liability with respect to such rates, will be determined by our initial rate regulations adopted on April 1, 1993. The lawfulness of rates in effect on or after May 15, 1994, and refund liability with respect to such rates, will be determined in accordance with the new rules adopted herein.

113. The specifics of how the new rules will be applied, and how cable systems and regulators should transition from the old rules to the new rules, is discussed in detail in the following sections. In addition, the specific calculations a regulated cable system will need to use to apply the revised benchmark system are set forth in new FCC Form 1200.

a. Systems Not Entitled to Transition Relief

114. As noted above, regulated cable systems that are not

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[143] This cost study will be conducted in connection with the development of final cost-of-service rules for cable operators. We adopted interim cost-of-service standards in a companion order also released today. See Cost Proceeding.

[144] Systems entitled to transition relief who believe that these industry figures do not result in adequate rates may elect to make a cost-of service showing to justify rates at the end of the transition period.

[145] In the absence of industry-wide cost data, we are limited in our basis upon which to analyze several issues, including the causes of relatively low, noncompetitive rates as well as the extent to which costs may differ between noncompetitive and competitive small operators. As a result, it is imperative that the industry, in particular small systems and systems whose rates are below the new benchmark, provide detailed cost information through the cost study and the related proceeding in order to resolve the remaining questions regarding cable rates and costs.

entitled to transition relief[146] will be required to set their rates at a level that equals their September 30, 1992 regulated revenues per subscriber reduced by the revised 17 percent competitive differential and floated forward for certain adjustments.[147] As under the old benchmark system, we are using September 30, 1992 regulated rate levels as our starting point to avoid building into permitted rate levels any unwarranted rate increases that may have occurred after the 1992 Cable Act was passed but before we adopted our initial rate regulations on April 1, 1993.[148] Applying the revised 17 percent competitive differential to September 30, 1992 rates thus will best ensure that subscribers pay "reasonable" regulated cable rates.

115. As we previously determined, however, a system may have incurred costs since September 30, 1992 that should be reflected in its lawful rate. In particular, we believe that regulated systems should be allowed to include in their permitted regulated rates: (1) the inflation occurring between October 1, 1992 and September 30, 1993;[149] (2) changes in external costs that have occurred since the system became subject to initial regulation at either the local or federal level (or February 28, 1994, whichever was earlier);[150] and (3) changes that have

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[146] As explained in more detail below, regulated cable systems not eligible for transition relief are those systems (1) who are owned by an operator serving more than 15,000 total subscribers and (2) whose rates, after applying the full 17 percent competitive differential as required by our calculations, are above the new benchmark.

[147] Regulated systems wishing to support higher rate levels must submit a cost-of-service showing.

[148] See Rate Order at para. 218.

[149] In our April, 1993 Rate Order, we decided to allow inflation adjustments on an annual basis. Rate Order at para. 240. Cable systems will thus be eligible to file for an inflation adjustment for the period beginning October 1, 1993 and ending June 30, 1994 once the final Gross National Product Fixed Weight Price Index (GNP-PI) for the quarter ending June 30, 1994 is released. We are using a June 30 cycle for inflation because the final GNP-PI is generally released 90 days after the end of each quarter. We thus anticipate that operators will have the final GNP-PI figure for June 30, 1994 by September 30, 1994 in time for their first annual rate adjustment.

[150] In the Rate Order, we determined that cable systems would be allowed to increase rates for so-called "external costs" that occurred after the date of initial regulation or February 28, 1994, whichever occurred first. See Rate Order at para. 255.

resulted from the addition or deletion of program channels to regulated service tiers since September 30, 1992.[151] Accordingly, after reducing its regulated September 30, 1992 rate levels by the 17 percent competitive differential, a regulated system will be allowed to adjust that rate forward for the described changes. The resulting rate will be known as the "full reduction rate."

116. A system whose rate level being justified is above its full reduction rate level must reduce its rate to the full

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The date of initial regulation, in turn, is defined for the basic service tier as the date on which the cable system receives a notification from its local franchising authority that the authority has become certified and intends to regulate the system's basic service and equipment rates. See 47 C.F.R. Section 76.922(b)(7). For cable programming service rates, the date of initial regulation is the date on which a complaint concerning those rates is filed with the Commission. See 47 C.F.R. Section 76.922(b)(7).

In the Rate Order, we decided that it was not necessary to have a single date of initial regulation for purposes of calculating external costs because we believed that the dates of regulation for the two types of regulated services -- basic and cable programming services -- were likely to be close in time to each other. Rate Order at para. 255, n.607. Experience since that time has taught us that this is not always the case. Accordingly, to greatly simplify operators' external cost calculations and to enable regulators to better monitor future rate increases, we are modifying our rules on our own motion to provide for a single start date for the accrual of permitted external costs. That date will be the earliest of (1) the date of initial regulation for the basic service tier, (2) the date of initial regulation for cable programming services, or (3) February 28, 1994.

[151] Under our rules, permitted changes in rates to reflect changes in the number of channels on regulated tiers are governed as follows: Channels added to or deleted from regulated tiers between September 30, 1992 and the date of initial regulation (or February 28, 1994, whichever occurs earlier) are handled through application of the old benchmark methodology pursuant to the calculations set forth in FCC Form 393. Channel changes that occur between the date of initial regulation (or February 28, 1994, where applicable) and the effective date of the new rules are accorded external cost treatment only (to reflect changes in programming costs), since going-forward rules to govern those changes had not yet been adopted. Channel changes occurring after the effective date of the new rules will be governed by the going-forward methodology adopted in The Fourth Report and Order, below.

reduction rate level, unless it qualifies for transition treatment as discussed in the sections below.[152] By contrast, a system whose rate level being justified is below the full reduction rate will be permitted to raise its rate level up to the full reduction rate level. This is because the full reduction level establishes the reasonable rate level for that system under our rate regulations. Any cable system that sets its rates at the full reduction rate level will be entitled to adjust those rates in the future for annual inflation, changes in external costs, and changes in the number of regulated channels.[153]

b. Systems Entitled to Transition Relief

(i) Systems Owned by Small Operators

117. As noted above, systems owned by "small operators" will not be required to reduce rates to the full reduction level immediately. Instead, they will be allowed to cap their rates at their March 31, 1994 levels[154] until we have completed our study of the prices and costs experienced by systems of this type.

118. We adopt this transition approach for cable systems owned by small operators for several reasons. First, evidence submitted by petitioners in this proceeding suggests that smaller

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[152] As explained in para. 126, infra, this rate level is measured by the system's average regulated revenue per subscriber.

[153] The requirements for adjusting rates for changes in external costs, inflation and channels on regulated tiers are set forth in Commission rules adopted in this and earlier orders. Operators will use FCC Form 1210 to make these adjustments.

[154] We are using March 31, 1994 as our measure for determining transition treatment because that date is the end of the first quarter in calendar year 1994. As explained at para. 176, we have decided to adopt standardized quarters for calculating quarterly changes in external costs (and annual changes for inflation) in order to greatly simplify the rate-setting process. In addition, use of March 31, 1994 as the start date should prevent small operators from attempting to change their rates (or their status as small operators) before the transition analysis takes place to gain an advantage not intended by our rules. Systems that attempt to engage in such evasive behavior will be subject to sanctions under the rate evasion provisions of our rules.

systems may face higher than average costs.[155] This evidence is insufficient to allow us to conclude that all small systems face systematically higher costs due to the absence of industry-wide cost data. The information in the record, nonetheless, raises a legitimate question as to whether some systems (and operators) with a limited subscriber base do in fact have unusually high costs (and thus lower-than-average margins). In addition, we are concerned that some small operators may not have the financial wherewithal to withstand the impact of a significant rate reduction. We therefore believe that it is appropriate to study the costs of small operators, and compare those costs with the prices they charge for regulated services and equipment, before requiring them to reduce their rates to the full reduction level.

119. We note, however, that the existing record evidence does not enable us to find that small operators should not eventually be required to apply the full revised competitive differential. Thus, as with other operators subject to transition relief, systems owned by small operators will be required to apply the full 17 percent competitive differential unless the price/cost data we collect persuade us that a smaller competitive differential should be applied to them.[156]

120. For purposes of deciding eligibility for transition relief, systems owned by "small operators" are defined as systems which are owned by operators with a total subscriber base of 15,000 or less as of March 31, 1994, and which are not affiliated with or controlled by larger operators.[157] Our survey of industry rates as of September

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[155] See e.g., Coalition of Small System Operators, Supplemental Information re: Programming Costs for Large Cable Operators Versus Small Operators (Feb. 15, 1994); Small Business Cable Association, Supplemental Comments in Further Support of Industry Benchmark Adjustments for Low Density and Smaller Cable Operators (Feb. 15, 1994) at 5-10.

[156] We also note that, in order to ensure a relatively stable regulatory environment, systems owned by small operators will not be required to apply more than the full 17 percent competitive differential, regardless of the results of our price/cost analysis.

[157] Our concern with small operators is aimed at those companies that do not have access to the financial resources or other purchasing discounts of larger companies. We are thus limiting transition relief to small operators that have no such relationship with a larger company. For purposes of determining whether a larger company has a sufficiently significant interest in, or control over, a small operator to give rise to this concern, we will not extend transition treatment to small

30, 1992, the Competitive Survey, revealed that, on average, cable systems charge roughly $20 to $25 each month for all regulated services and equipment.[158] Using this figure to estimate regulated revenue per subscriber, this means that an operator with a total subscriber base of 15,000 earns approximately $3.6 to $4.5 million annually from regulated cable service. We believe that operators who exceed this revenue level are sufficiently large that they will likely be able to apply for bank loans, credit lines or other sources of financing in their communities should application of the full 17 percent competitive differential pose financial difficulties for them. Moreover, as noted above, we have some record evidence that raises the possibility that some small systems serving 1,000 or fewer subscribers may have higher than average costs. Should this prove to be true, we do not believe that these higher costs necessarily will be experienced only by small systems serving 1,000 or fewer subscribers; some systems with slightly larger subscriber bases may also face such costs. Establishing a 15,000 total subscriber base cut-off will thus serve the additional purpose of providing transition relief to a number of smaller systems serving more than 1,000 subscribers that could possibly be found to face unusually high costs.

121. In adopting transition relief for small operators, we need to address two possible complicating scenarios. The first involves a small operator who subsequently purchases, or is purchased by, another cable operator so that the combined subscriber base of the two operators exceeds 15,000. We believe that the small operator in such a situation should not be required to forfeit its transition treatment simply because an acquisition has occurred. We accordingly will grandfather the rate treatment of the small operator pending completion of our cost analysis. We note, however, that the grandfathered treatment will apply only to the systems originally owned by the small operator, and will not extend to the new systems it has acquired (or with which it has

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operators in which a larger company holds more than a 20 percent equity interest (active or passive) or over which a larger company exercises de jure control (such as through a general partnership or majority voting shareholder interest). We believe that in both of these cases, the large company will have a significant enough stake that it will be likely to extend financial resources to the small operator should that operator face financial difficulties.

[158] Competitive Survey as of September 30, 1992.

been merged).[159] In this way, we will avoid creating any artificial regulatory incentives that either encourage or discourage the acquisition of cable systems by small or large operators.

122. The second scenario that could potentially arise concerns cable operators who cross the 15,000 subscriber demarcation line by either adding or dropping subscribers as their business naturally expands or contracts. A system owned by a small operator on March 31, 1994 that is entitled to transition treatment will not lose its eligibility for that treatment simply because the operator grows above the 15,000 subscriber limit prior to the completion of our cost analysis.[160] Similarly, an operator that exceeds the 15,000 subscriber cut-off on March 31, 1994 will not gain eligibility for transition relief if it subsequently loses sufficient subscribers to bring it below the 15,000 subscriber limit. We believe that these principles are necessary to avoid introducing regulatory incentives for operators either to add or drop subscribers in order take advantage of a particular rate treatment.[161]

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[159] Thus, for example, if an operator with 100,000 subscribers acquires a 5,000 subscriber system from a small operator, the 5,000 subscriber system would not have to apply the competitive differential unless and until other systems owned by small operators were required to reduce their rates upon completion of our cost analysis. If a 12,000 subscriber operator were acquired by a 9,000 subscriber operator, the systems owned by both formerly small operators (now one large operator) also would be entitled to retain their eligibility for transition relief. On the other hand, a system owned by a larger operator on March 31, 1994 -- and required to reduce its rates to the full reduction level or to the benchmark -- will not be allowed to reverse that rate cut if it is subsequently acquired by, or acquires, a small operator. For instance, if a 20,000 subscriber operator sells a 3,000 subscriber system to a 5,000 subscriber operator, the 3,000 subscriber system will not be allowed to undo a rate cut made pursuant to the benchmark mechanism simply because it is now owned by a small operator.

[160] Such growth does not include the addition of subscribers through acquisition or merger. See para. 160, supra.

[161] We also recognize that, in choosing a 15,000 total subscriber cut-off, we may be excluding from transition relief some small operators who are just over the limit on March 31, 1994. To soften the impact of our revised rate regulations for such operators, we will allow operators whose subscriber base exceeds 15,000 total subscribers by no more than 1,000 subscribers to petition the Commission for emergency relief

(ii) Low-Price Systems

123. The second class of regulated cable systems entitled to transition treatment are those whose March 31, 1994 rates are below the revised benchmark, and those whose March 31, 1994 rates are above the revised benchmark but whose full reduction rates are below the revised benchmark. These systems are charging comparatively low prices when measured against other noncompetitive systems, as indicated by their position relative to the new benchmark. As noted above, we have no conclusive evidence demonstrating that these "low-price" noncompetitive systems are not exercising the market power reflected in the 17 percent competitive differential that we found to exist, on average, between the rates charged by noncompetitive systems and systems subject to effective competition. In particular, we tested these low-price systems for various demand and cost characteristics and did not find that their rates significantly varied in any systematic way from those of all other noncompetitive systems.

124. Nonetheless, we remain concerned that, because their prices are significantly lower than those charged by most noncompetitive systems, systems in this second class may face unusual demand, cost or other influences that have not been captured in our analysis to date. Accordingly, to study this issue further, we will grant transition treatment to cable systems with relatively low prices (i.e., those with rate levels below the revised benchmark and those with rate levels above the revised benchmark but whose full reduction rates are below the benchmark). We note, however, that the record evidence to date leaves us unable to conclude that these systems should ultimately be exempted from the requirement to apply the full revised competitive differential. Thus, as with small operators subject to transition relief, systems with relatively low prices will be required to apply the full 17 percent competitive differential if additional analysis of their costs fails to

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entitling them to transition treatment. Such petitions should be based on a showing that not treating the operator as a "small operator" will cause substantial hardship. A major factor in making this determination will be evidence regarding the operator's price/cost margin. For example, if the operator's systems have a density of 35 or fewer homes passed per mile, this would be one piece of evidence that the operator may have higher costs. See e.g., Televista Communications, Inc. Reply to Oppositions to Petitions for Reconsideration at 5 and Attachments A and B; Small Cable Business Association, Petition to File Supplemental Comments and Plan for Interim Relief for Low Density and Smaller Cable Businesses at Attachment A (Jan. 29, 1994).

demonstrate that a smaller competitive differential should be applied to them.[162]

125. In order to determine whether they are "low-price" systems entitled to transition relief, all systems that do not qualify for transition treatment under our "small operator" definition will be required to compare their March 31, 1994 rates to the new benchmark and to their full reduction rates using FCC Form 1200. Systems whose March 31, 1994 rates[163] are below the revised benchmark, or whose March 31, 1994 rates are above the revised benchmark but whose full reduction rate is below the revised benchmark, will be eligible for transition treatment.

126. To compare its rates to the new benchmark, a cable system will first calculate its "regulated revenue per subscriber" for the franchise area at issue as of March 31, 1994. The "regulated revenue per subscriber" is the cable system's revenue from its basic and cable programming service tiers, plus its regulated equipment revenue, divided by its number of subscribers. The cable system will then calculate its "benchmark regulated revenue per subscriber" using the revised benchmark formula.[164] This benchmark rate

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[162] Again, as with small operators qualifying for transition treatment, no low-price system will be required to apply more than the 17 percent competitive differential at the conclusion of the price/cost analysis.

[163] As explained at note 154, supra, we are using March 31, 1994 as our measure for determining transition treatment because that date is the end of the first quarter in calendar year 1994. Moreover, use of March 31, 1994 as the start date should prevent operators from trying to change their rates before the benchmark comparison occurs to gain an advantage not intended by our rules. Systems that attempt to engage in such evasive behavior will be subject to sanctions under the evasion provisions of our rate rules.

[164] To ease the administrative burden on all cable systems, the Commission will make available authorized copies of a computer disk that contains an electronic version of FCC Forms 1200 and 1205 (the form for determining costs of regulated cable equipment and installation). This computerized form will enable a system simply to input the information needed to calculate its permitted program service and equipment rates. The computer will then perform the necessary calculations automatically, including applying the new benchmark formula.

We emphasize that comparisons to the benchmark will be made using the new, not the old, benchmark formula. Because the

will be based on the system's characteristics as of March 31, 1994.[165] The benchmark rate will incorporate the 17 percent competitive differential and will be adjusted for inflation to enable the cable system to make a proper comparison between its March 31, 1994 rates and the benchmark.[166]

c. Application of Transition Relief

127. Regulated cable systems eligible for transition relief, either because they are owned by small operators or because they are low-price, will not be required to adjust their rates to the full reduction rate level pending completion of the Commission's price/cost analysis. Rather, systems that are owned by small operators and systems whose March 31, 1994 rates are below the revised benchmark will not have to make any reductions at this time. Systems whose March 31, 1994 rates are above the revised benchmark but whose full reduction rates are below the revised benchmark will only be required to reduce those rate levels to, and

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formula has been revised, operators will need to calculate whether they fall under the new benchmark; they cannot simply rely on the fact that they previously fell under the old benchmark.

[165] As noted previously, the benchmark formula has been revised to reflect an improved statistical and economic analysis. One of the most significant changes is that the formula now contains a number of new variables that we find to have a statistically significant impact on cable system rates. Variables in the old formula included whether a system was subject to effective competition, total number of regulated channels, number of subscribers to the cable system, and number of satellite-delivered signals. By contrast, variables in the new formula are based on: the number of channels on the system weighted by the proportion of subscribers taking each channel; the number of subscribers in the system; the proportion of nonbroadcast channels on the system; whether a system is a low penetration, overbuild or municipal system; whether a system is affiliated with a multiple system operator and the size of the multiple system operator; the proportions of subscribers with additional outlets, with remote controls, taking the lowest cable service tier, and changing tiers per year; and the median income in the system's area. See Technical Appendix at 12-19.

[166] This inflation adjustment is necessary because the benchmark formula is based on data reflecting industry rates as of September 30, 1992. The formula therefore must be inflated forward to March 31, 1994 to permit a comparison with a system's March 31, 1994 rates.

not below, the revised benchmark during the transition period. We are not requiring these latter systems to reduce their rate levels below the revised benchmark for two related reasons. First, as noted above, we are studying further the question of whether below-benchmark rates are more likely to be reasonable than above-benchmark rates, because they are comparatively lower. In light of this outstanding inquiry, we do not believe it would be appropriate to require regulated systems to reduce their rates below the benchmark level at this time. Second, requiring any systems whose rates are currently slightly above the benchmark to reduce their rate levels to the full reduction levels, but not requiring below-benchmark systems to reduce their rates at all, would result in inequitable treatment of systems that may be fairly similarly situated.[167]

128. For purposes of applying the new rate rules, a system's March 31, 1994 rate is the rate that the system was permitted to charge under the old benchmark system, which in turn would consist of its initial permitted rate[168] plus any external costs that it accrued up to March 31, 1994.[169] We realize that some systems have already become subject to regulation at the local or federal level, and some have not. If, on March 31, 1994, a system is involved in a pending rate proceeding before either its local franchising authority or the FCC, its March 31, 1994 rate will be the rate that the regulator ultimately decides is reasonable.[170]

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[167] For example, a system whose current rate level is $30, whose benchmark is $28, and whose full reduction rate is $22.50 should not be required to reduce its rate to $22.50 during the transition period, given that a system with the same benchmark of $28 whose rate is $27 is not required to make any further rate reductions pending completion of our price/cost analysis. Thus, the operator with the $30 rate will only be required to reduce its rate to the benchmark - $28.

[168] Cable systems electing the benchmark approach use FCC Form 393 to determine their initial permitted rates as of the date they first become subject to regulation at the local or federal level.

[169] As described in para. 171, supra, cable systems are able to accrue external costs starting on either the date of initial regulation or February 28, 1994, whichever occurs earlier.

[170] This reasonable rate must include the external costs to which the system was entitled between the date of initial regulation for any tier (or February 28, 1994, whichever is earlier) and March 31, 1994.

It will also be subject to refund liability for the period during which its March 31, 1994 rate may have been unlawfully high as measured under our current rules.[171] We impose this requirement because we do not intend for our transition approach to serve as a shield to rate reductions that may be required as a result of pending proceedings initiated under our prior rules. Similarly, if a system entitled to transition relief that is not already regulated becomes subject to regulation after March 31, 1994, it will be required to revise its rate and issue any relevant refunds[172] should the regulator determine that its March 31, 1994 rates were unlawful under our initial benchmark rules. This approach is necessary both to ensure that subscribers get the benefits of rate reductions to which they would have been entitled under the old rules, and to ensure that cable systems that became subject to regulation before May 15, 1994, the effective date of the new rules, are not treated differently (and more adversely) than systems that become subject to regulation after that date.

129. We also note that our decision to relieve systems entitled to transition treatment from immediate application of the full competitive differential does not relieve those systems of our other requirements concerning the restructuring of equipment and program service offerings. Thus, all regulated systems except those excused by specific provisions in our rules remain required to (1) set equipment rates at cost (including a reasonable profit), (2) unbundle equipment charges from programming rates, and (3) apply an average rate per channel when setting program tier

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If the March 31, 1994 rates used by the operator on FCC Form 1200 are subsequently found not to be lawful by a local or federal regulator, the operator will be required to update the rates submitted in the form to reflect the proper rates.

[171] The system's refund liability obviously will cover any period during which it had such liability under application of our initial benchmark regulations. It will also, however, exist after May 15, 1994 under our revised rules and will be measured by the difference between the system's actual March 31, 1994 rate and the rate that the regulator ultimately determines was reasonable under the old benchmark rules. Any refund liability under the revised regulations will terminate when the system adjusts its rates to reflect the regulator's determination.

[172] See 47 C.F.R. Section 76.942.

charges.[173]

130. Systems eligible for transition relief will be subject to a modified price cap pending completion of the Commission's price/cost analysis. Specifically, these systems, like all other regulated systems, will have to compute their full reduction rate.[174] They will also have to calculate their "transition rate," which is simply the rate that they are permitted to charge at the beginning of their transition period.[175] Systems entitled to transition treatment may increase their rates to reflect increases in external costs and increases caused by channel changes that accrue after March 31, 1994.[176] We are permitting these particular rate increases because we wish to preserve sufficient incentives for systems to retain, and add, programming channels to regulated program services during

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[173] These requirements will not apply, however, to small systems serving 1,000 or fewer subscribers that are eligible for, and elect to implement, streamlined rate reductions which permit them to avoid these restructuring requirements as long as they implement a 14 percent line-item reduction for each regulated rate component that appears on subscribers' bills. See paras. 208-217, infra.

[174] See para. 115, supra, for a discussion of how this rate is calculated. A system's full reduction rate will also be adjusted during the transition period to reflect changes in external costs, the number of regulated program channels and inflation.

[175] Thus, for systems owned by small operators and systems with below-benchmark rates, their "transition rate" will be their March 31, 1994 rate, as appropriately updated since that date. For systems whose March 31, 1994 rate is above the benchmark, but whose full reduction rate is below the benchmark, their "transition rate" will be the benchmark rate, as appropriately updated.

[176] Permitted increases in external costs will be determined pursuant to our external cost rules adopted in the Rate Order and subsequently modified herein and in the First Reconsideration Order. See Rate Order at paras. 241-257; First Recon. Order at paras. 87-123; see also infra at paras. 169-177. Increases due to subsequent channel changes in regulated tiers after the effective date of this Order will be governed by the "going-forward" methodology adopted in this Order. See paras. 231-249, infra. Channel changes occurring between September 30, 1992 and the date of initial regulation (or February 28, 1994, whichever occurs first) will be handled through application of the old benchmark methodology. See note 151 supra.

the transition period, and both external costs and the "going-forward" methodology allow recovery of program-related expenses.

131. We will not allow such systems, however, to increase their transition rates due to increases in inflation until the transition rate equals their full reduction rate. Under the revised rules, a system's full reduction rate -- which, unlike its transition rate, rises with inflation as well as with changes in external cost and channel changes -- may eventually exceed the transition rate. At the point when the transition rate and the full reduction rate become equal (if such a point occurs during the transition period), the system will be entitled to adjust its rate upward to take advantage of all future inflation adjustments. This process protects the cash flows of systems subject to transition relief, while gradually bringing their rates in line with the full reduction amounts. This smooth transition to full reduction rates should thus reduce the administrative and financial burdens of implementing the full competitive differential.[177]

d. Regulated Rates at the End of the Transition Period

132. In the near future, the Commission will initiate an industry cost study pursuant to our cost-of-service rulemaking proceeding.[178] Information about the prices and costs of small operators and low-priced systems will be collected as part of that effort. In addition, we will shortly issue a further notice in this proceeding to enable these systems to submit additional evidence to us concerning their prices and costs.

133. The Commission will use the information it receives in these proceedings to determine what competitive differentials ultimately are appropriate for the two classes of systems eligible for transition relief. The competitive differentials for each category will then be applied on a

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[177] As explained in the following section, at the end of the transition period, any system will be entitled to full future inflation adjustments once it has attained the full reduction rate corresponding to the competitive differential that has been determined to be appropriate for it as a result of our price/cost analysis.

[178] See Cost Proceeding.

classwide basis.[179] In no instance will either class be subject to a competitive differential greater than 17 percent. Subject to that limitation, we expect to apply the largest competitive differential that is consistent with the average operator in each class earning the 11.25 percent rate of return that we are today adopting in our interim cost-of-service rules.[180]

134. Once the appropriate competitive differential has been applied to a system, that system will be entitled to an "aggregate inflation adjustment" equal to all GNP-PI inflation adjustments for the period beginning October 1, 1992 through the most recent June 30. To the extent a system has already received some inflation adjustment for that period, the system will receive the net of the aggregate inflation adjustment minus any inflation adjustment already received. In either case, after the end of the transition period, a system will be eligible for additional inflation adjustments on an annual basis, but no earlier than September 30 of each year, when the final GNP-PI through June 30 of each year is released.

e. Calculation of Refund Liability

135. In general, regulated systems who select the benchmark approach to setting rates will be required to comply with the revised rules by May 15, 1994 in order to avoid refund liability. We recognize, however, that there may be some systems who will not be able to bring their regulated rates into compliance with the modified benchmark system by that time. Specifically, to comply with the new rules, operators will need to collect the necessary rate-setting information, complete the applicable FCC Forms to determine their new permitted rates, and give the required notice of any rate changes to their subscribers.[181] Although the Commission is making every effort to ensure that this process runs as smoothly as possible (by, for example,

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[179] Regulated systems who believe that these industry figures do not provide them adequate rates may elect to make a cost-of-service showing.

[180] Stated differently, when evaluating the costs of systems entitled to transition treatment, we will not treat as a legitimate cost a rate of return that is above the 11.25 percent return that we have found is appropriate in our cost-of-service order.

[181] We are also in this Order revising our provisions concerning the notice that must be given to subscribers before a rate change is implemented. See paras. 139-143, infra.

making FCC Form 1200 and related forms available on a computer disk), it is aware that some systems may have difficulty completing the necessary tasks before the effective date of the new rules.

136. Accordingly, to reduce the burden on cable systems that cannot conform their regulated rates to the new benchmark approach by the effective date of the revised rules, we will not impose refund liability on such systems for an additional 60 days after May 15, 1994 (i.e., until July 14, 1994), as long as certain conditions are met. First, systems wishing to take advantage of this deferral of refund liability may not change any rate for regulated service or equipment, or restructure any regulated service or equipment offering (by, for example, removing program channels from what would be regulated service tiers and placing them into an "a la carte" package), during the period that runs from the release date of this Order to July 14, 1994. Moreover, a cable system that does restructure its rates and service offerings, even in compliance with our rules, before July 14, 1994 will have its refund liability triggered on the date the restructuring occurs. These conditions are needed to ensure that cable systems do not attempt to game the benchmark process before the new rules take effect and during the refund deferral period.

137. Second, cable systems taking advantage of the refund deferral period must still give at least 30 days notice to subscribers of any rate or service changes they ultimately make in response to the new rules, as required under our revised notification provisions.[182] Our experience with the rate changes that occurred shortly before the initial rate regulations went into effect on September 1, 1993 revealed that many subscribers were surprised by the rate and service offering changes that were made because we had preempted all notification requirements. We believe that consumers are better served if they have sufficient warning that their rates and service offerings may change again, even if those changes primarily result in rate decreases.

138. Third, all rate and service restructuring must be completed by July 14, 1994 (the end of the 60-day deferral

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[182] See infra para. 139. We will preempt any local and state requirements that require cable systems to give more than 30 days notice of rate and service changes to subscribers where application of the local and state provisions would serve to prevent a system from bringing its rates into compliance with the new benchmark rules by the end of the refund deferral period.

period) in order to avoid refund liability.[183] We believe that an additional two months beyond the effective date of our new rules provides cable systems adequate time in which to familiarize themselves with the regulations and take the necessary actions to comply. This is particularly true given that rate regulation is already well under way for many operators.

f. Notice to Subscribers

139. The Commission's existing rate regulations require that cable systems give 30 days notice to franchising authorities of any rate increase.[184] Our customer service standards provide that systems must give 30 days notice to subscribers before implementing any rate or service changes.[185] These standards, however, are enforced in the first instance at the local level by local franchising authorities, and not primarily by the Commission.[186] In order to better ensure that consumers have sufficient notice of rate and service changes and to clarify operators' notification requirements, we are modifying our rate regulations to require that cable systems give 30 days notice to both subscribers and franchising authorities before implementing any rate or service changes.

140. In addition, our experience with the rate changes that occurred in the wake of rate regulation suggests that a number of cable subscribers have either not been informed or have been confused about the reasons for recent rate or service changes. To ameliorate this situation, we are expanding the notice requirement to ensure that cable operators provide consumers with better information about why rates or services are changing. In particular, cable systems will have to identify on subscriber bills the precise amount of any rate change and briefly explain its cause (e.g., inflation, changes in external costs or the addition/deletion of channels (identified by name)). This information must be presented in a way that enables the

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[183] Restructuring is considered to be completed when bills reflecting the rate and service changes have been issued to subscribers. If an operator has a staggered billing cycle, the relevant date will be the date on which the first cycle of bills is mailed, as long as the billing cycle is completed within 30 days from that date.

[184] Rate Order at para. 124; 47 C.F.R. Section 76.964.

[185] 47 C.F.R. Section 76.309(c)(3)(i).

[186] 47 C.F.R. Section 76.309 (a), (c).

average subscriber to understand readily why his or her rates have increased or decreased.

141. In our April, 1993 Rate Order, we did not require that cable systems provide subscribers with information regarding how to lodge complaints about rate changes, but instead only required that notices of upcoming rate changes include the name and address of the system's local franchising authority. We also did not require that rate change notices include the address of the Commission. Upon further consideration, we believe that it would impose little or no additional burden upon cable systems but would better serve consumers if systems were required to notify subscribers of their right to file complaints about rate changes for cable programming services or associated equipment. This notice shall 1) indicate that subscribers may file such complaints within 45 days of the change being reflected in their bill, and 2) provide the address and phone number of the local franchising authority and the Commission.[187] We believe these changes in our notice requirements will make it easier for subscribers to ask the Commission to investigate potentially unjustified changes in rates for cable programming services. In order to minimize burdens on cable operators, however, we also reaffirm our prior conclusion that the notice will not have to include a copy of our complaint form.[188]

142. These notice requirements are effective immediately upon publication of the revised rules in the Federal Register. We find good cause to make these requirements effective on less than 30 days notice in the Federal Register.[189]

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[187] The address of the Commission is Federal Communications Commission, Cable Services Bureau, Consumer Protection Division, 1919 M Street, N.W., Washington D.C. 20554. The phone number is 202-416-0856.

[188] Rate Order at para. 124.

[189] See 5 U.S.C. Section 553(d)(3). Good cause exists because we believe it is important that the notice provisions set forth above apply to rate changes made pursuant to this Order. Were the normal 30-day period to apply, it would be possible for cable operators to revise their rates pursuant to this Order without complying with the notice provisions. For example, a cable operator could send a notice of rate changes pursuant to this Order on May 13, 1994, complying only with the notice requirements previously in effect and not providing, for example, the address and phone number of the Commission.

143. In addition, we are requiring that all cable system bills to subscribers contain the address and phone number of the local franchising authority and the Commission. We believe that this requirement will impose little or no additional burden upon cable systems and will be useful to consumers.

g. Procedural Issues for Franchising Authorities

144. We realize that local franchising authorities and cable operators currently involved in proceedings concerning basic cable rates may have questions regarding the procedural deadlines that they must follow, given the adoption of our revised rate rules. As explained below, with one exception, we see no reason why franchising authorities and cable operators should deviate from the timeframes already established in Sections 76.930 and 76.933 of our Rules for proceedings that were initiated before the effective date of this Order. Thus, adoption of this Order generally does not affect the basic deadlines to which local authorities and operators must adhere for resolving pending rate cases under our initial benchmark regulations. Moreover, as detailed below, all operators involved in a pending case will be required to submit a rate justification on the required FCC Forms within 30 days after the revised rules take effect on May 15, 1994.[190]

145. We believe that there are generally five points in the rate-setting process that a local franchising authority and cable operator may be on May 15, 1994. The first is where the franchising authority has not certified to regulate basic rates by that date, or has certified but has not yet notified the operator that it is commencing basic rate regulation. In this case, the cable system will be required to file both an FCC Form 393 and new FCC Form 1200 30 days after the local authority notifies it that the authority is initiating rate regulation of the basic service

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[190] In all relevant cases, if the operator elects to take advantage of the deferral of refund liability period described above at para. 135-138, supra, it must notify the local franchising authority by the date on which its rate justification on an FCC Form is due that it is electing that option. The system will then have 30 days from the date on which it ultimately restructures its rates to submit the relevant FCC forms, although in no event will such forms be filed more than 30 days after July 14, 1994, the last date of the refund liability deferral period.

tier.[191] FCC Form 393 will be used to determine the operator's permitted rates from September 1, 1993 until May 15, 1994, and FCC Form 1200 will be used to determine its permitted rates after May 15, 1994. The franchising authority will then be expected to examine both filings within the timeframes established in Section 76.933.

146. Second, if, by May 15, 1994, a franchising authority has notified the cable operator that it has become certified, but the operator has not yet submitted the required FCC form (e.g., because the 30 day response period has not lapsed), we will require the cable operator to file both FCC Form 393 and new FCC Form 1200 within 30 days after May 15, 1994.[192] We believe this limited deviation from Section 76.930 of our rules, which requires the cable operator to file its schedule of rates within 30 days of the date of a written request from the franchising authority, is justified because it will allow the operator to complete both forms simultaneously, with minimal disruption to the franchising authority. The franchising authority will be expected to examine both filings within the time periods established in Section 76.933.

147. Third, if, by May 15, 1994, a franchising authority has received the cable operator's filing for justifying rates under the old benchmark system but has not reached a final decision pursuant to Sections 76.933 or 76.936 of our rules, we expect the franchising authority to follow all existing timeframes with respect to that part of

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[191] It will not be necessary to file an FCC Form 393, however, if the one-year time limit on the operator's refund liability precludes any possibility of refund for the period before the effective date of the revised rules. See Section 76.942.

[192] There is one exception to this rule. In our Third Recon. Order in this docket, we make clear that franchising authorities have the power to impose sanctions, including findings of default, on cable operators who fail to file documents relevant to a rate determination in response to requests from the franchising authority. We will permit any cable operator who has not filed a requested FCC Form 393 within the 30 day time period established in Section 76.930 to do so by the effective date of these rules. If the operator fails to do so, the franchising authority will be permitted to apply the sanctions outlined in our Third Recon. Order in this docket.

the proceeding.[193] The cable operator in this situation will also be required to file new FCC Form 1200 with the franchising authority within 30 days of May 15, 1994. The franchising authority will then resolve the second portion of the proceeding, in which it will evaluate the cable operator's rates under the revised rules, according to the separate timeframes established in Section 76.933.[194]

148. Fourth, if, by May 15, 1994, a franchising authority has reached a final decision about the lawfulness of an operator's basic rates under our initial rate rules, we will require the cable operator to file new FCC Form 1200 within thirty days of May 15, 1994. The franchising authority will then examine the form pursuant to the time frames established in Section 76.933.

149. Finally, if a franchising authority has reached a final decision on the cable operator's rates, and a rate increase request is pending as of May 15, 1994, the cable operator will be required to file new FCC Form 1200 within thirty days of May 15, 1994. The rate increase request will then be evaluated pursuant to the data submitted on the FCC Form 1200, rather than by any data that had already been submitted by the operator in support of its rate increase request.[195]

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[193] Franchising authorities are reminded that they may issue an accounting order requesting that the cable operator keep a record of its rates if the authority is unable to reach a rate determination within the prescribed time period. See 47 C.F.R. Section 76.933(c). If the authority later determines that the operator's basic rates were unlawfully high, the operator's refund liability will extend from the date the accounting order was issued up to the date on which the operator eventually adjusts its rate in response to the franchising authority's decision, and then back for a period not to exceed one year. See 47 C.F.R. Section 76.942(c); Rate Order at para. 142, n.376.

[194] We do not establish special provisions to address situations where franchising authorities have failed to issue extension orders for pending local rate proceedings as permitted under current rules. Presumably, local authorities that have not extended the time for completion of local proceedings have determined that additional time is not necessary.

[195] This is because the FCC Form 1200, in addition to computing the operator's initial permitted rate on May 15, 1994, also calculates permitted rate increases that may have occurred through the first quarter of 1994. Operators will be able to file rate justifications after June 30, 1994 to reflect external costs incurred during the second quarter of 1994.

h. Pending Complaints Before the Commission

150. There are currently a number of complaints regarding rates for cable programming services tiers pending before the Commission. Unless we have issued a decision on a pending complaint before May 15, 1994, the operator about whom the complaint was made must file an FCC Form 1200 in addition to the FCC Form 393 it either has filed or must file. Such operators will be subject to refund liability calculated under our initial regulations for rates that were in effect from September 1, 1993 until May 15, 1994 (although obviously any refund liability will not start until the complaint was filed). Refund liability with respect to rates charged on and after May 15, 1994 will be calculated pursuant to the revised rules adopted in this Order.[196]

151. Our reason for imposing this requirement is that most operators whose rates did not comply with our former rules also will be in violation of our new rules due to the increased competitive differential. Therefore, in most cases, a valid complaint made prior to the effective date of these new rules will remain valid. In addition, rates that may have been permissible under our former rules may be in violation of our new rules. Requiring operators against whom a complaint has been filed to submit an FCC Form 1200 thus will enable us to determine whether those operators are currently complying with our rules, regardless of their status under our initial rules.

152. To the extent there is a complaint regarding cable programming service tier rates pending before the Commission, we will continue to require the cable operator in question to file notice of any changes in rates with the Commission.[197] This notice must be filed at least 30 days before such rates are proposed to be effective. This notice is necessary to allow the Commission to ensure that the cable service tier rate is not unreasonable.

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[196] As with basic tier regulation, if the operator elects to take advantage of the deferral of refund liability period described at para. 135-138, supra, it must notify the Commission by the date on which its rate justification on an FCC Form is due that it is electing that option. The system will then have 30 days from the date on which it ultimately restructures its rates to submit the relevant FCC forms, although in no event will such forms be filed more than 30 days after July 14, 1994, the last date of the refund liability deferral period.

[197] See FCC Form 393 at page 2 (General Instruction 1).

5. Commission Authority to Adopt the Modified Ratemaking Approach

153. We conclude that the modified ratemaking approach we now adopt is consistent with our statutory authority under the Cable Act of 1992. Section 623(b)(1) of the Communications Act, 47 U.S.C. Section 543(b)(1), mandates that the Commission ensure that rates for the basic service tier are "reasonable." In addition, regulated upper tier rates may not be "unreasonable." Section 623(c)(1), 47 U.S.C. Section 543(c)(1).[198] Nothing in the Cable Act of 1992 compels the use of a specific ratemaking model to ensure that rates are reasonable. Rather, Section 623(b)(1) of the Act, 47 U.S.C. Section 543(b)(1), specifies that the "goal" is "protecting subscribers" from higher rates than would be charged if all cable systems were subject to "effective competition." Sections 623(b)(2)(C) and 623(c)(2) of the Act, 47 U.S.C. Sections 543(b)(2)(C) and 543(c)(2), also set forth various factors the Commission must consider in establishing its ratemaking approach, but the statute leaves to the Commission the way in which these factors should be taken into account.

154. Indeed, Congress specifically rejected the approach mandated by the House bill, which would have required the Commission to establish a formula to set the maximum price for basic tier service.[199] As enacted, Section 623(b)(2)(B) of the Act, 47 U.S.C. Section 543(b)(2)(B), instead provides that the Commission "may adopt formulas or other mechanisms and procedures." The legislative history explains:

> Rather than requiring the Commission to adopt a formula to set a maximum rate for basic cable service, the conferees agree to allow the Commission to adopt formulas or other mechanisms and procedures to carry out this purpose. The purpose of these changes is to give the Commission the authority to choose the best method of

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[198] The Commission previously has concluded that there is no distinction to be drawn between the statute's use of different language for basic tier service (ensuring reasonable rates) and regulated upper tier service (determining rates to be unreasonable). See Rate Order at paras. 387-389. On reconsideration, the Commission affirmed this conclusion. First Recon. Order, at paras. 32-36. Accordingly, our discussion here applies to our ratemaking approach for both basic service tier rates and cable programming service rates.

[199] House Report at 5.

> ensuring reasonable rates for the basic service tier and to encourage the Commission to simplify the regulatory process.[200]

Thus, the statute does not require us to craft a benchmark system of regulation, to calculate an estimated competitive differential, or to use any particular weighing methodology to calculate the competitive differential.

155. More generally, the courts have recognized that regulatory agencies are afforded wide latitude in discharging their ratemaking functions. Rather than insisting upon a single regulatory method for determining reasonable rates, courts evaluate whether the "end result" of a particular regulatory scheme results in rates that are within a "zone of reasonableness."[201] Ratemaking under the Communications Act and similar statutes "is not an exact science."[202] It involves both quantitative and qualitative judgments and predictions about the future. Thus, courts have stressed that "neither law nor economics has yet devised generally accepted standards for the evaluation of ratemaking orders."[203] Moreover, as one court has noted in

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[200] Conference Report at 62.

[201] See FERC v. Pennzoil Producing Co., 439 U.S. 508, 517 (1979); Permian Basin Area Rate Cases, 390 U.S. 747, 797 (1968); Jersey Cent. Power & Light Co. v. FERC, 810 F.2d 1168, 1177 (D.C. Cir. 1987), quoting, Washington Gas Light Co. v. Baker, 188 F.2d 11, 15 (D.C. Cir. 1950), cert. denied., 340 U.S. 952 (1951). See also FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944) ("it is the result reached not the method employed that is controlling"). Accord Illinois Bell Tel. Co. v. FCC, 988 F.2d 1254, 1260 (D.C. Cir. 1993).

[202] United States v. FCC, 707 F.2d 610, 618 (D.C. Cir. 1983).

[203] Permian Basin, 390 U.S. at 790, quoted in United States v. FCC, 707 F.2d. at 618. In other contexts as well, courts have recognized that there is not necessarily a "correct" answer when agencies draw lines. See ALLTEL Corp. v. FCC, 838 F.2d 551, 559 (D.C. Cir. 1988) (an agency's "selection of a precise point on a scale" will be accorded deference unless the scale "has 'no relationship to the underlying regulatory problem'") (quoting Home Box Office, Inc. v. FCC, 567 F.2d 9, 60 (D.C. Cir. 1977), cert. den., 434 U.S. 829 (1977)); MCI Telecommunications Corp. v. FCC, 627 F.2d 322, 341 (D.C. Cir. 1980) ("[t]he best must not become the enemy of the good"); Storer Broadcasting Co. v. FCC, 240 F.2d 55, 56 (D.C. Cir. 1956) ("specific numerical limitations" in the FCC's multiple ownership rules "may not be upset" where "[o]ur attention has not been drawn to any matters

reviewing the exercise of our ratemaking power in the telephone context, ratemaking decisions "are appropriately treated as policy determinations in which the agency is acknowledged to have expertise."[204] Thus, the courts recognize that regulatory agencies generally have broad discretion to choose methods and procedures in ratemaking determinations, provided the rates are within a "zone of reasonableness."[205] By choosing to require that basic rates be "reasonable" and that upper tier rates not be "unreasonable," we believe that Congress has invoked this general body of law for application under the Cable Act. Thus, we have been instructed to consider the factors enumerated in the Cable Act and to use our expertise to achieve Congress's overall goal of ensuring "reasonable" rates for subscribers.

156. Against this legal backdrop, we have reconsidered our overall methodology for achieving the statutory goal of setting reasonable rates. While our initial regulatory methodology furthered the goal of the statute, we believe that methodology can be improved, for the reasons explained in detail herein. Upon further reflection, and based on a fuller record, we now believe that our revised methodology better achieves the overriding statutory goal of establishing reasonable rates.

157. In this regard, in response to NYNEX's petition for reconsideration, we have revisited and refined our approach to analyzing the competitive sample for purposes of estimating the competitive differential. Although we disagree with NYNEX that we can or should exclude the rates of low penetration systems from our competitive samples, we believe that our revised approach more appropriately considers the rates charged by all three categories of systems (low penetration systems, overbuilds, and municipals) that are deemed to be subject to effective competition under Section 623(l)(1) of the Act, 47 U.S.C. Section 543(l)(1).

158. In our view, our revised competitive differential of 17 percent is a more accurate reflection of the overall

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which outweigh [the FCC's] judgment based upon 'accumulating insight'") (quoting FCC v. RCA, 346 U.S. 86, 96 (1953)).

[204] United States v. FCC, 707 F.2d at 618 and cases cited therein.

[205] See Permian Basin, 390 U.S. at 800; FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942); United States v. FCC, 707 F.2d at 618.

competitive differential, and based on a sounder methodology, than the figure of ten percent that we previously used. The difference between the two figures is primarily due to the fact that we previously averaged all of the data in our competitive sample, thus giving disproportionate weight to the low penetration systems which constituted more than half of the sample, while we have now taken a more qualitative approach, under which the data regarding the three groups are considered separately. An averaging approach is less appropriate, as a technical matter, than the qualitative approach we have now adopted because the statistical tests show that the three types of systems differ from each other. Where different groups are statistically different from each other, there is no good reason to consider them as one group. It makes more sense to consider them separately, since the statistical tests tell us that they are separate groups.[206] Our refinement illustrates the sort of "pragmatic adjustment" that is within our discretion under the Cable Act of 1992 and general ratemaking principles.[207] In this manner, we more fully effectuate the statutory goal of establishing reasonable rates.

159. While we have modified the way in which the three statutory classes of systems deemed to be subject to effective competition are taken into account in arriving at the competitive differential, we have continued to consider all three categories. Our goal, as before, is to set "reasonable" rates that are no higher than the rates of systems subject to "effective competition" as defined by Congress. We believe our modified competitive differential establishes more "reasonable" rates, that is, rates approximating what would be charged if cable systems faced effective competition.

160. Our refined approach is consistent with our previous determination that "cable systems with less than 30 percent penetration should continue to be included in the sample of systems subject to effective competition."[208] While we have determined that we may not exclude from the competitive sample the rates of one of the category of systems that Congress has deemed to be subject to "effective competition," nothing in the Cable Act of 1992 requires that we estimate a competitive differential simply by averaging the per-channel rates charged by all of the systems included

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[206] See supra n. 114.

[207] United States v. FCC, 707 F.2d at 618.

[208] Second R&O, at para. 128.

in our competitive sample and comparing that average to the average per-channel rate charged by the systems in our noncompetitive sample. As stated above, Congress decided not to enact the House proposal that would have required us to establish formulas, instead providing that we "may adopt formulas or other mechanisms and procedures."[209] In addition, giving more weight to the data relating to overbuild systems -- systems that actually compete against one another to some extent -- is consistent with Congress's finding that "[w]ithout the presence of another multichannel video programming distributor, a cable system faces no local competition," and "[t]he result is undue market power for the cable operator as compared to that of consumers."[210]

161. At the same time, it is important to note that the data relating to low penetration systems affected the calculation of the competitive differential. If instead of not differing from the noncompetitive systems in our sample, the rates charged by low penetration systems had been significantly lower, we might have selected a higher competitive differential. For example, if the rates of low penetration systems in areas with many broadcast television stations had been 25 percent lower than the rates charged by noncompetitive systems, that would have suggested that the availability of over-the-air broadcast television signals limits the market power of cable systems in some circumstances. Since it is hard to see why overbuilds would have more market power than low penetration systems, a 25 percent differential would have suggested that the differential observed in our sample between overbuilds and noncompetitive systems was depressed by collusion to a greater extent than we have estimated. Accordingly, we would have revised that estimate or placed more reliance on the data involving municipal systems if the data relating to low penetration systems had been different. With respect to our authority under the statute, the point is that it is clear that the rates charged by low penetration systems were "take[n] into account," since the rates that were observed for low penetration systems affected the calculation of the competitive differential.

162. Similarly, the other factors that we have been directed to "take into account" or "consider"[211] will affect

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[209] Section 623(b)(2)(B), 47 U.S.C. Section 543(b)(2)(B).

[210] That finding was set out in Section 2(a)(2) of the Cable Act of 1992, 106 Stat. 1460, which was not codified.

[211] See Sections 623(b)(2)(C) and (c)(2), 47 U.S.C. Sections 543(b)(2)(C) and (c)(2).

the rates charged by regulated operators. Those factors primarily involve the costs and revenues of cable companies. Because we recognize that application of the competitive differential would not result in a reasonable rate for every cable system, but would instead set the rates of some systems below the amount that a cable operator without market power would charge, we are today adopting revised "cost-of-service" regulations that will permit cable operators to choose not to apply the competitive differential, but instead to have their rates set according to procedures analogous to those used to set the rates of public utilities. The optional "cost-of-service" rules that we announce today are based largely on the costs and revenues of cable companies.[212] The existence of the cost-of-service "safety valve" affects our determination of the competitive differential by allowing us to estimate it most accurately, secure in the knowledge that those operators for whom our competitive differential is inaccurate may choose

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[212] The Act requires the Commission to take into account several factors in prescribing its rate regulations for the basic and cable service tiers, many of which are cost based. The factors that the Commission is directed to take account of with respect to the basic tier include: (a) the rates charged by systems subject to effective competition; (b) the direct costs of obtaining and transmitting signals carried on the basic tier; (c) a reasonable portion of the joint and common costs of providing signals carried on the basic tier; (d) advertising revenues or other consideration obtained in connection with the basic tier; (e) a reasonable portion of franchise fees, taxes or other charges imposed on the system; and (f) amounts required to satisfy franchise-imposed public, educational, or government (PEG) or other service requirements; and (g) a "reasonable profit." See Section 623(b)(2)(C), 47 U.S.C. 543(b)(2)(C). With respect to rates for cable programming service tiers, the Act directs the Commission to consider: (a) the rates for similarly situated cable systems; (b) the rates of cable systems subject to effective competition; (c) the history of the rates for cable programming services charged by the system; (d) the rates, as a whole, of all regulated services and equipment offered by the system; (e) the capital and operating costs of the system; and (f) other revenue received by the system for carriage of the program channels included in cable programming service. See Section 623(c)(2), 47 U.S.C. 543(c)(2). In the Rate Order, we explained how our regulatory framework governing cable service rates, comprised of both the benchmark and cost-of-service approaches, is based on, and takes into account, these statutory factors. Rate Order at paras. 254, 387 n.946, 400 n.976.

not to use it.[213]

163. Moreover, the factors involving the costs and revenues of cable companies are taken into account more directly in our calculation of the competitive differential. In determining whether a rate is "reasonable," we have focused on whether a cable operator without market power would charge such a rate. In order to stay in business over the long run, a cable operator without market power would need to charge rates that would cover, for example, its "direct costs . . . of obtaining, transmitting, and otherwise providing signals," and "the capital and operating costs of the cable system,"[214] which are among the factors we have been directed to consider in setting rates. Likewise, it is reasonable to assume that a cable operator lacking market power would charge rates that reflect, for example, "the revenues (if any) received by a cable operator from advertising."[215] The reasonable rate that is determined by applying the competitive differential should allow cable operators to cover their costs and obtain a reasonable profit. At the same time, the cost-of-service option is available for cable operators that would not be able to cover their costs after applying the competitive

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[213] Petitioners for reconsideration of the April 1993 Rate Order suggest that the benchmark approach denies cable operators their constitutional right to a reasonable profit. E.g., Booth American Company et. al. Petition for Reconsideration at 10; see also Century Communications Corp. Petition for Reconsideration at 2 (benchmark, taken together with cost-of-service procedures, fails to provide for reasonable profit in violation of the Fifth Amendment); Stanley M. Searle Petition for Reconsideration at 4 (Fifth Amendment violated by a benchmark that is not cost-based for each operator); Viacom International Inc. Petition for Reconsideration at 3-4 (Hope doctrine requires full and fair recognition of external costs in going-forward methodology). We reject petitioners' constitutional argument because the courts look only at the "end result" in evaluating allegations that rates are unconstitutional. Here, the benchmark does not determine the end result because a cable system retains the option to initiate a cost-of-service proceeding if it believes that the benchmark mechanism fails to provide a reasonable return.

[214] See Communications Act, Sections 623(b)(2)(C)(ii), (c)(2)(E); 47 U.S.C. Section 543(b)(2)(C)(ii), (c)(2)(E).

[215] See Communications Act, Section 623(b)(2)(C)(iv), 47 U.S.C. Section 543(b)(2)(C)(iv) (basic tier service), and Section 623(c)(2)(F), 47 U.S.C. Section 543(c)(2)(F) (upper tier service).

differential.

164. In certain respects, the approach we now adopt is analogous to the judicially approved manner in which we prescribe a rate of return for telephone companies. In the telephone context, we select a prescribed rate of return from within a broad "zone of reasonableness" that is bounded generally on the upper end by rates that would be unreasonably high from the perspective of consumers and on the lower end by rates that would not sufficiently protect the interests of investors in the regulated enterprise. In selecting the prescribed rate of return within this broad range of permissible rates, we consider numerous factors that go into the ratemaking decision, according greater or lesser weight to individual factors on the basis of the record and in the exercise of our judgment and expertise.[216]

165. That is essentially what we have done in selecting the revised competitive differential. We have examined the rates charged by the three types of systems that Congress has determined to be subject to effective competition and determined that they charge between one percent and 37 percent less than noncompetitive systems. We have narrowed that broad range by focusing on the overbuild sample, since we have determined that the rates charged by overbuilds best approximate the "reasonable" rates that would be charged by systems lacking market power. We have adjusted the differential between overbuilds and noncompetitive systems in light of the data relating to low penetration systems and municipals, the lack of full head-to-head competition between overbuilds, and the possibility of collusion between operators in an overbuild situation. Those adjustments substantially restricted the zone from which the competitive differential was selected.

166. Our current approach is consistent with our prior legal analysis, since we did not say that all of the specifics of our prior approach were mandated by the statute. Nor could we plausibly have contended that the statute required us to calculate a competitive differential by relying on a simple averaging of the rates of all systems

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[216] See, e.g., Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, 5 FCC Rcd 7507 (1990), recon., 6 FCC Rcd 7193 (1991), aff'd sub nom. Illinois Bell Telephone Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1993); Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975).

subject to "effective competition" as defined in the Act.[217] The only possible basis for such a conclusion would be the sentence in Section 623(b)(1) of the Communications Act, 47 U.S.C. Section 543(b)(1), which provides that our "regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition." But it would not be a natural reading of that sentence, which appears to emphasize the goal of "protecting subscribers," to conclude that it requires us to calculate a competitive differential following the precise methodology that we followed previously. Besides being an unnatural reading of that sentence, such an interpretation would be inappropriate for a number of other reasons. First, as noted above, Congress made clear in Section 623(b)(2)(B), 47 U.S.C. 543(b)(2)(B), that it was not mandating the use of formulas at all. In addition, such an interpretation would negate Congress's general instruction directing us to establish "reasonable" rates. That is, there would be no point in instructing us to set "reasonable" rates if we were compelled to set rates by calculating the competitive differential exactly as we did before. Furthermore, in Section 623(b)(2)(C)(i), 47 U.S.C. Section 543(b)(2)(C)(i), Congress instructed us to "take into account . . . the rates for cable systems, if any, that are subject to effective competition." There would be no need to instruct us to take those rates "into account" if another provision compelled us to use them to set rates in a specific manner. In addition, the "if any" language in Section 623(b)(2)(C)(i) suggests that Congress was not sure that any cable systems were subject to "effective competition," and a Congress that was unsure of that fact would not have compelled us to follow the methodology that we followed previously, which is entirely dependent on the existence of such systems. Finally, it is not clear why Congress would have instructed us to take various other factors "into account" if we were obliged to follow a formula set out in another subsection of the statute.

167. In addition to adjusting the competitive differential, the other key change made with respect to rate calculations in this Order is our decision to apply the competitive differential to most cable systems although immediate rate reductions will not be required for operators

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[217] In our view, averaging the data from all systems is consistent with the terms of the statute, but is not mandated by the Cable Act.

with relatively low rates or for small operators while we study the prices and costs these operators experience. Nothing in the statute suggests that we were required to use a benchmark approach. Nor is our decision to defer rate reductions for some operators, pending completion of our cost study, unreasonable. To the contrary, as we have explained, nothing in the current record suggests that the competitive differential should not be applied to all regulated operators, and economic theory suggests that cable operators with market power will exercise it. The only factor favoring an approach that limits immediate reductions is our concern that cable operators with relatively low rates may not be exercising market power to the same degree as those with higher rates. Absent cost data, we cannot determine whether that concern warrants a revision of the competitive differential for cable operators with relatively low rates. In those circumstances, the competitive differential ought to be applied to all regulated operators unless cost data convinces us otherwise.

168. Nor is our decision to delay application of the competitive differential to small operators, pending a cost study, unreasonable or contrary to the statute. As we have explained, we lack reliable data with respect to the financial situation of small operators as a class. In addition, small operators are more vulnerable than larger operators, and therefore a small operator may be harmed more seriously by application of the competitive differential if the competitive differential is not appropriate. Of course, small operators may invoke cost of service procedures -- indeed, a streamlined cost of service procedure is available for small operators -- but it would be administratively burdensome if regulators were flooded with cost of service applications from small operators. In those circumstances, it is prudent to give small operators a further opportunity to present cost data showing that they do not, as a rule, charge unreasonable rates, and to stay application of the competitive differential for small operators until that study is completed.

6. The Price Cap Governing Cable Service Rates

a. Calculation of External Costs

169. In our April 1993 Rate Order, we determined that rates for regulated cable services would be governed by a price cap once initial regulated rates were set.[218] We also determined that the price cap should be expressed as a price

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[218] See Rate Order at paras. 227, 396.

per channel.[219]

170. In the Rate Order, we determined that capped rates may be adjusted for inflation. The Commission selected an annual adjustment measured by the gross national product fixed weight price index (GNP-PI).[220] We determined that cable operators could make such inflation adjustments annually, but stated that cable operators could adjust for inflation for the part of the year between the initial date of regulation and the beginning of the next year.[221]

171. The Rate Order also provided that cable operators may pass through to subscribers increases in certain categories of external costs. Those external costs included the additional or new retransmission consent fees incurred after October 6, 1994, other programming cost increases (with some exceptions for program purchases from affiliates),[222] taxes, franchise fees,[223] and the costs of other franchise requirements including the costs of any public, educational, or governmental access programming

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[219] Id. at para 229. We also separately provided for annual recalculations of equipment costs based on the operator's previous fiscal year or in certain cases a representative month. First Recon. Order at para. 67.

[220] See Rate Order at para. 239. See generally 47 C.F.R. §76.922(d)(2)(i).

[221] Rate Order at para. 240. A system's initial rate included inflation from September 30, 1992 until the system's initial date of regulation or 180 days from the date of the Commission's rate regulations (i.e., by February 28, 1994), whichever occurred earlier. Id. at para. 255.

[222] Adjustments to permitted charges to reflect increases in costs of programming obtained from affiliated programmers that exceeded inflation were permitted as long as the price charged to the affiliated system reflects either prevailing company prices offered in the marketplace to third parties (where the affiliated program supplier has established such prices) or the fair market value of the programming. First Recon. Order. at para. 114. Also, increases in programming costs were required to be adjusted to reflect any revenues received by the operator from the programmer. Rate Order at para. 253, n. 602.

[223] Changes in franchise fees were not allowed to result in an adjustment to permitted charges, but were to be calculated separately as part of the maximum monthly charge per subscriber for a tier of regulated programming service. See 47 C.F.R. Section 76.922(d)(2)(v).

required by the franchising authority.[224] We concluded that external cost recovery (except for franchise fees to which the annual inflation adjustment did not apply) would be permitted only to the extent that the increases exceed the rate of inflation.[225] We also provided that, with the noted exception for retransmission consent fees, cable operators could pass through to subscribers any changes in external costs that accrued after the date on which the tier at issue became subject to regulation or 180 days after the effective date of our initial regulations (i.e., February 28, 1994), whichever occurred first.[226]

172. We subsequently decided that operators could file rate increases no more than quarterly on account of external cost increases.[227] We also decided that an operator must reduce its permitted rates to reflect any decreases it experiences in external costs. Such decreases must be reflected in any filings the operator makes for inflation or increases in external costs and, in any event, all decreases must be reflected in the operator's rates within one year from when they occurred.[228]

173. Thus, under our initial rules, operators may adjust their regulated rates annually by inflation and up to quarterly by the net change in external costs. As indicated above, any change in external costs must also be measured against inflation and adjusted for the corrected inflation rate. In order to simplify the calculations to be used for making these rate adjustments, however, we reconsider on our own motion our rules in this area.

174. Specifically, we have decided to separate the inflation adjustment from the external cost adjustment. Under the new approach, an operator seeking to adjust capped rates to reflect changes in its external costs will determine the actual level of its external costs. This figure will then be removed from the total charge for the

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[224] Rate Order at paras. 241-254; see also First Recon. Order at paras. 88-115.

[225] Rate Order at para. 257. In our First Order on Reconsideration, we established special rules for adjusting quarterly external cost increases for annual inflation. First Recon. Order at para. 122.

[226] Rate Order at para. 255.

[227] First Recon. Order at paras. 119-123.

[228] Id. at para. 123.

affected service tier. The "residual" will be adjusted for inflation on an annual basis, but no earlier than September 30 of each year, when the final GNP-PI through June 30 of each year is released, and no later than December 31 of each year.[229] By contrast, the external cost component that does not include the "residual" may be adjusted quarterly for net changes in external costs.[230]

175. Because the residual rate that is adjusted for inflation does not reflect the operator's external costs, there is no possibility of double recovery of external cost increases that concerned us in the Rate Order.[231] Therefore, it will no longer be necessary to compare changes in external costs to inflation, as under our initial approach, or to later adjust the external cost increases based on the annual inflation rate. The new approach will produce the same rates as the requirements specified previously in the Rate Order, but should be simpler to apply. We therefore adopt it as the method for making adjustments to capped rates for inflation and changes in external costs.

176. We will retain the requirement that, in the absence of a showing that a rate increase is necessary to avoid confiscation, operators may file rate increases no more frequently than quarterly to reflect increases in external costs, under the requirements specified in the First Recon. Order. However, to simplify the filing procedures significantly, we are requiring all systems to use calendar year quarters, rather than quarters that begin on the date the tier at issue became subject to regulation.[232] We also will allow operators to accrue external costs for any program service tier from the date on which the first of the operator's tiers became subject to

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[229] We clarify that an operator must make its inflation adjustment by the end of the calendar year if it wishes to change its rates for the changes in inflation that have occurred.

[230] As discussed above, we have also established special provisions covering adjustments to capped rates for systems eligible for transition treatment. See supra para. 130 for a fuller discussion of the transition provisions discussed in this paragraph.

[231] See Rate Order at para. 257.

[232] This change is reflected in the new forms operators are required to support their rates under the revised rules. The forms also ensure that operators are compensated for all changes in external costs that have occurred since the relevant starting date.

regulation (or February 28, 1994, whichever was earlier).[233] This will allow operators to keep track of their external costs from a single date rather than from multiple dates that may or may not be close in time to each other.[234] And, we are clarifying that operators may file for a rate increase on account of changes in external costs as soon as the information necessary to make the change is available. We believe this process best serves the interests of both subscribers and operators, without creating undue administrative burdens.[235]

177. FCC Form 1210 and associated instructions set forth the specific steps for making these calculations.

b. Copyright Fees

178. The Commission has not addressed whether copyright fees incurred by the carriage of distant broadcast signals should be accorded external cost treatment. Several petitioners request that we treat such fees as external costs, and that we allow systems to recover copyright fees from September 30, 1992, forward, separate and apart from the operators' permitted rates. In support of their

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[233] See para 171 & note 226, supra.

[234] Operators that wish to adjust rates for external costs that occurred during a particular period also must include any rate adjustments needed to reflect changes that have occurred in the number of channels on regulated tiers and, if an annual change, inflation. This requirement again will greatly simplify the calculations that an operator will have to perform when adjusting rates under our price cap and going-forward methodologies.

[235] We also recognize that cable operators may experience decreases in external costs. Prompt reflection of such decreases in rates would benefit consumers. At the same time, a requirement for immediate rate filings to reflect decreases in external costs could significantly increase burdens on operators and regulators. Therefore, we do not alter our requirement that any filing to reflect increases in external costs or the annual inflation adjustment must also reflect any decreases in such costs that have occurred over the same period. We will continue to require operators to file revised rates to reflect decreases in external costs that are reflected in other rate filings no later than one year from when such decreases occur. These provisions will ensure that consumers will receive the benefits of decreases in external costs within a reasonable time without imposing significant burdens on operators. See First Recon. Order at paras. 119-123.

request, these petitioners assert: (1) that copyright fees were not reflected in the Competitive Survey data on which we based the rate formula, because many operators separately itemize these costs on subscriber bills;[236] (2) that copyright fees should be treated like taxes because they amount to a government-imposed tax on the transaction between operators and subscribers;[237] and (3) that if copyright fees are not given external cost treatment, many operators will be forced either to drop distant broadcast signals or submit cost-of-service showings.[238]

179. To the extent that petitioners are asking that we revise the rate calculation process by subtracting copyright fees from the rate survey data and then permitting a system's specific copyright fees to be added back to calculate the allowable rate for a specific system, we do not believe this change is either practical or justified. Although copyright fees may be separately itemized by some systems, there is no evidence in the record that operators did not include these itemized fees when providing information about their rates in response to our rate survey. Thus, there is no reason to assume that our survey results do not already reflect copyright fees, or that the requested change would make our survey results more

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[236] Intermedia Petition at 9.

[237] Id. at 8.

[238] See, generally, Intermedia Partners Petition for Reconsideration at 7-10; United Video Reply to Petitions for Reconsideration at 5. Intermedia further argues that the Commission's new mandatory signal carriage rules, 47 C.F.R. Section 76.55(c)(2), will result in operators paying additional copyright fees, which supports its assertion that copyright fees are largely beyond operators' control. Intermedia Petition at 8. We specifically addressed this question in the Rate Order regarding broadcast signal-carriage issues, noting that the 1992 Cable Act provides that a broadcaster must indemnify the cable operator for any increased copyright costs resulting from carriage of the distant broadcast signal under must-carry status. Communications Act, Section 614(b)(10)(B), 47 U.S.C. Section 534(b)(10)(B)(commercial stations); Section 615(i)(2), 47 U.S.C. Section 535(i)(2)(noncommercial and educational stations). Thus, we determined that if an operator's copyright fees increase because of new must-carry responsibilities, e.g., if the operator is required under the must-carry rules to carry a third distant signal, these incremental costs are the responsibility of the relevant broadcaster. Report and Order in MM Docket No. 92-259, 8 FCC Rcd 2965, 2992-93 (1993). The same holds true generally for noncommercial and educational stations. Id.

accurate. Moreover, we previously determined that copyright fees do not constitute taxes on the transaction between the operator and the subscriber because (1) they are imposed only in the sense that all legal obligations are imposed by government;[239] and (2) these fees are merely consensual arrangements relating to the consideration to be paid in exchange for carriage of programming.[240] We thus are unpersuaded by petitioners' argument that copyright fees are "taxes" that should therefore be given external cost treatment.

180. However, to the extent that petitioners' argument is that increases in compulsory copyright fees incurred by carrying distant broadcast signals should be treated in a fashion parallel to increases in the contractual costs for nonbroadcast programming, we believe it has merit. Section 76.922(d)(2) of our regulations, subject to specified limitations, permits subscriber rates to be adjusted to take into account changes in certain "external costs," including "programming costs." Copyright fee increases, whether they result from the addition of new broadcast signals to a tier, adjustments to the fee levels by the arbitration panels under the aegis of the Copyright Office, or from adjustments in tier structures, appear to fit logically within the programming costs category.

c. Pole Attachment Fees

181. The Commission has not addressed whether pole attachment fees should be accorded external cost treatment. Some cable operators argue that costs associated with pole attachment fees should be treated as external costs because (1) such fees are largely beyond their control since operators typically must utilize existing poles owned by utilities and have no choice but to pay any utility-imposed increases in pole-attachment fees, and (2) pole attachment fees historically have increased at a rate faster than inflation.[241]

182. Although pole attachment fees are to some extent beyond the control of system operators, we are not persuaded that they are sufficiently unique among the numerous categories of costs that make up the expense accounts of system operators to warrant external treatment. Unlike

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[239] Rate Order at para. 547.

[240] Id. at para. 547, n. 1402.

[241] See Crown Media Inc. Petition for Reconsideration at 4-8.

increases in franchise fees or taxes, pole attachment fees are not imposed by the government nor are they, like programming expenses, an area with respect to which the legislative history of the 1992 Cable Act expresses explicit concern.[242] In addition, some pole attachment fees are regulated under the 1978 Pole Attachment Act, 47 U.S.C. § 224, which should provide operators some recourse against unreasonable pole attachment fee increases. We accordingly will not permit operators to treat pole attachment fees as external costs.[243]

7. Other Rate Issues

183. Other rate issues raised in petitions for reconsideration are (1) whether cable operators should be allowed to charge commercial customers different rates than residential customers, (2) whether systems located in Alaska and Hawaii should be exempted from benchmark regulation, and (3) whether we should adopt a subscriber line charge that would be paid by consumers purchasing only basic service.

a. Commercial Rates

184. Cablevision and NCTA urge the Commission to clarify that cable operators are not required to charge the same rates to residential and commercial customers.[244] They contend that the ability to charge commercial rates will facilitate the provision of service to commercial subscribers, such as sports bars and restaurants, and that this benefits viewers who are customers of these commercial establishments. Cablevision also states that the 1992 Cable Act does not specifically require that the same rates be applied to commercial and residential customers. It argues that certain isolated references in the legislative history to "homes" and "households" indicate an intent that residential service be regulated differently than commercial

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[242] See Rate Order at para. 8.

[243] Our rules generally provide for waivers in unusual cases. We will consider the need for special relief in instances of significant hardship resulting from unusually large pole attachment fee increases imposed by utilities or other pole providers not subject to regulation under the Pole Attachment Act. Showings of significant economic hardship in this regard may include, but will not be limited to, showings regarding both the magnitude of the increases in pole attachment fees and the impact of the increase on the operator.

[244] NCTA Petition for Reconsideration at 34; Cablevision Response To Petitions for Reconsideration at 6-8 (July 21, 1993).

service.[245] Cablevision requests that cable operators be allowed to charge different rates to commercial subscribers, and that the determination of whether such rates are reasonable or unreasonable be made in the context of the commercial use of such cable service.[246]

185. We are not persuaded that the Commission should establish provisions authorizing special, presumably higher, rates for regulated cable services provided to commercial establishments. While it is possible that our overall standards for reasonable rates could, depending on the specific implementation, provide for special, higher rates for commercial establishments, neither the Cable Act nor its legislative history evinces an intent that the Commission should generally do so. Moreover, petitioners have not suggested how such rates would be determined. Nonetheless, it is possible that higher rates for commercial establishments could play a role in assuring that rates for subscribers are reasonable if the higher commercial earnings were offset by savings to subscribers. Accordingly, while we will not adopt regulations permitting special commercial rates at this time, we will consider, on a case-by-case basis, specific proposals that cable operators may want to make that would produce savings for consumers. In addition, we are further exploring this issue in our Further Notice of Proposed Rulemaking.[247]

b. Rate Relief for Alaska and Hawaii

186. The Medium-Sized Operators Group requests that the Commission establish special rates for cable systems located in the Alaska and Hawaii. It claims that system operating costs are significantly higher for cable systems in Alaska.[248] Alaska Cablevision urges an exemption from rate regulation for Alaskan cable systems, particularly small

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[245] Cablevision at 8, citing S. Rep. No. 92, 102d Cong., 1st Sess. 8 (expressing concern that "only a small percent of the cable homes" were protected by rate regulation under the Commission's 1991 definition of effective competition) and H.R. Rep. No. 628, 102d Cong., 2d Sess. 29-30 (discussing the number of "households" served by cable and its competitors).

[246] Cablevision Response to Petitions for Reconsideration at 8 (July 21, 1993).

[247] See para. 257, infra.

[248] Medium Sized Operators Group Comments on Petitions for Reconsideration at 3 (July 21, 1993).

systems serving rural areas.[249]

187. As discussed above, we have determined that the rates of cable systems not subject to effective competition as defined in the 1992 Cable Act presumptively reflect their market power. With certain transitional exceptions, we have required that all regulated operators reduce rates by the competitive differential in order to avoid refund liability. Petitioners have failed to present any evidence showing that rates for cable service provided by operators subject to regulation in Alaska and Hawaii do not also reflect their market power. Thus, we see no reason why operators in those states should not be subject to the same competitive differential reduction as operators in other states, or why consumers in those states should not see benefits comparable to those that will be experienced by consumers in other states.

188. Moreover, the rates charged by operators in an unregulated marketplace in Alaska and Hawaii presumptively permitted recovery of any higher costs of providing service in those states. Application of the competitive differential will reduce cable rates in those states by the same percentage as in other states. Thus, operators in Alaska and Hawaii will be able to maintain rates that reflect any relatively higher costs of providing service in those states, although reduced by the competitive differential. Furthermore, the petitioners have failed to present cost information showing that, or to what extent, the costs of providing cable service in Alaska and Hawaii are higher than in the other forty-eight states. Therefore, we are unable in any event under the present record to fashion adjustments to rates to address allegedly higher costs of providing cable service in Alaska and Hawaii. We thus reject petitioners' requests on this issue. Of course, cable operators in Alaska and Hawaii with unusually high costs may invoke the cost-of-service rules. In addition, small and low priced cable operators in Alaska and Hawaii will be eligible for transition treatment on the same terms as other cable operators in the rest of the country.[250]

c. Basic Tier Access Charge

189. Under our methodology for setting initial regulated rates, operators develop per channel rates that are averaged across all regulated tiers, i.e., the

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[249] Alaska Cablevision Petition for Reconsideration at 1-2, 5.

[250] See supra paras. 117-126.

development of rates is tier neutral. The Medium-Sized Operators Group contends that tier neutrality severely limits an operator's ability to recover the costs associated with providing the basic service tier. Petitioner claims, without support, that the cost per subscriber to provide the capital and to maintain the cable infrastructure is approximately $20 per month, excluding programming costs. Petitioner thus proposes that we adopt a "subscriber line charge" that would be paid by subscribers who purchase only the basic tier. It contends that such an approach would be consistent with policies adopted by the Commission in connection with common carriers, citing MTS & WATS Market Structure: Third Report and Order, 93 FCC 2d 241 (1983).

190. Petitioner has failed to address specifically why our requirements for setting rates for the basic and upper tiers do not adequately permit recovery of all costs of providing cable service properly allocated to regulated tiers. Petitioner has also failed to demonstrate that our approach does not permit the recovery of all costs that could be assigned to a tier under any reasonable allocation method. In addition, we note that the federally mandated subscriber line charge to which petitioner refers was established to properly allocate to telephone subscribers a portion of nontraffic sensitive fixed costs associated with local loop plant. Petitioner has not demonstrated that there are similar costs associated with the provision of basic cable service. Accordingly, we reject petitioner's assertion that operators need a special surcharge on basic service.

C. "A La Carte" Packages

191. Under the 1992 Cable Act, video programming offered on a per channel or per program ("a la carte") basis is not subject to rate regulation.[251] In the April 1993 Rate Order, we held that we would not regulate collective offerings of otherwise exempt per channel or per program services so long as: (1) the price for the combined package does not exceed the sum of the individual charges for each component of service, and (2) the cable operator continues to provide the component parts of the package to subscribers separately.[252] We stated that the second condition would be met only when the per channel offering provides subscribers

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[251] Communications Act, Section 623(l)(2), 47 U.S.C. Section 543(l)(2).

[252] Rate Order, at paras. 326-329.

with a realistic service choice.[253] We also stated that we would retain jurisdiction to review individual offerings of "a la carte" channels to determine whether the attempted offering constituted an evasion of rate regulation.[254]

192. In light of the limited type of collective offerings of per channel services that were available at the time we adopted the Rate Order, we believed it was in the public interest to allow operators to sell collective offerings of "a la carte" services without subjecting the offering to rate regulation. In particular, we believed that market forces would likely ensure that the rates for these offerings would be reasonable.[255] Allowing nonregulated treatment of collective offerings of "a la carte" channels could also serve consumers' interests by making it possible for them to purchase packages of unregulated channels at a lower price than if channels were purchased individually.

193. However, since the adoption of the Rate Order, a number of operators have restructured service offerings so that channels that could have been subject to regulation have been removed from a regulated tier and are now offered on an "a la carte" basis as well as on a package basis.[256] Since the rates of the collective offerings of the "a la carte" channels are unregulated, operators may raise their overall rates for the same service by removing channels from

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[253] Id. at para. 328, n.808.

[254] Id.

[255] See Rate Order at para. 441, n.1105 ("Under the Cable Act, only programming sold on a per-channel or per-program basis is entirely deregulated. Thus, an operator would have to move a 'tier' channel to 'premium' status to escape regulation entirely. Based on our knowledge of industry practice to date, we doubt such changes will occur frequently....") and para. 453, n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, i.e., a per-channel or per-program offering, to avoid the rate regulation applicable to tiers.").

[256] On November 17, 1993, the Mass Media Bureau issued 16 letters of inquiry to various cable operators, and on December 13, 1993, it issued another 35 letters of inquiry, most of which addressed the issue of removal and repackaging of channels. More recently, on February 22, 1994, the Cable Services Bureau issued 11 letters of inquiry to cable operators, which, among other things, asked operators to justify "a la carte" offerings that may be inconsistent with the Commission's rate regulations.

regulated tiers and offering them on a package and an "a la carte" basis. We are concerned that this practice may not be consistent with the purposes of the 1992 Cable Act. In addition, we have received numerous complaints from local franchising authorities and subscribers concerning the terms and conditions of "a la carte" offerings of channels.[257] We are concerned that some of these offerings may not comply with our requirement that subscribers must have a realistic option to purchase channels that are not subject to regulation on an "a la carte" basis. Some of the repackagings of channels may also constitute prohibited evasions of rate regulation.[258]

194. As stated in the Rate Order, providing for nonregulated treatment of collective offerings of "a la carte" channels affords operators an opportunity to enhance consumer choice by making programming more affordable and more widely available.[259] At the same time, however, permitting nonregulated treatment can provide an opportunity for operators to engage in evasion of rate regulation.[260] On reconsideration, therefore, we continue to believe that the public interest will be served by generally permitting nonregulated treatment of collective offerings of "a la carte" channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation. We

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[257] See FCC News, "FCC Issues Letters of Inquiry Concerning Cable Rate Restructuring" (Nov. 17, 1993); FCC News, "FCC Sends 35 Letters of Inquiry Concerning Cable Rate Complaints" (Dec. 13, 1993); FCC News, "FCC Sends 11 Letters of Inquiry Concerning Cable Rate Complaints" (Feb. 23, 1994).

[258] Section 623(h) of the 1992 Cable Act, 47 U.S.C. Section 543(h), requires the Commission to establish standards, guidelines, and procedures to prevent evasions, including evasions that result from retiering, of rate regulation. The Commission defined a prohibited evasion as any practice or action which avoids our rules contrary to the intent of the Act or its underlying policies. See Rate Order at para. 451.

[259] Rate Order at para. 327.

[260] Service offerings that evade rate regulation will not be eligible for nonregulated treatment. If an operator seeks to establish nonregulated collective offerings of "a la carte" channels in a manner that evades rate regulation, the minimum remedy will be that the collective offering will be treated as a regulated tier of cable service, and that all of the operator's calculations of its permitted rates for regulated service must be adjusted accordingly. Forfeitures may also be appropriate in some cases.

believe that these objectives will be achieved if operators comply with the safeguards of our initial rules. Thus, collective offerings of otherwise exempt per channel or per program services will continue to be unregulated as long as: (1) the price for the combined package does not exceed the sum of the individual charges for each component of service, and (2) the cable operator continues to provide the component parts of the package to subscribers separately. This latter safeguard will be met if the "a la carte" offering constitutes a realistic service choice.

195. However, in order to address our concerns that some offerings established by operators in response to rate regulation may not be consistent with our goals and the 1992 Cable Act, and the fact that other offerings that could raise similar concerns could be initiated in the future, we are here providing interpretive guidelines for determining whether an operator's collective offering of "a la carte" channels should be accorded regulated or unregulated treatment.[261] These guidelines will enable operators to better determine what collective offerings of "a la carte" channels will be considered an evasion of rate regulation and/or a realistic service offering, and will help local authorities[262] and the Commission to assess expeditiously the appropriate regulatory status of individual offerings.[263] In evaluating offerings in individual cases, we will consider whether consumers are being offered a greater variety of programming choices and options and whether the price for those choices is generally increasing or decreasing from

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[261] We note that parties have raised a number of questions regarding how we define multiplexed services. We will decide that issue in a separate proceeding.

[262] As we explain below, local authorities may make determinations as to whether a collective offering of "a la carte" channels should be considered a regulated tier, even if the tier would be a cable programming services tier, because both our rules for setting initial regulated rates and our methodology for adjusting capped rates on a going-forward basis are based on the total number of channels on all regulated tiers. Thus, local authorities will need to determine whether a collective offering of "a la carte" channels is a regulated tier in order to determine the correct permitted rate for the basic service tier.

[263] Packages of "a la carte" channels offered prior to April 1, 1993, the date we adopted the Rate Order, will be accorded nonregulated treatment. This limited "grandfathering" of packages available on April 1, 1993 will avoid elimination of discounts that were available to consumers at that time and that may continue to be available.

previous levels.[264]

196. We have identified several factors that local authorities and the Commission should consider in assessing in an individual case whether an "a la carte" package enhances consumer choice and does not constitute an evasion of rate regulation. Several of these factors, if present, would suggest that the rates for the offering should be unregulated. These are:

(1) the operator had offered (or begun to explore offering) "a la carte" packages consisting of non-premium channels prior to rate regulation;

(2) the operator has conducted market research that suggests introducing an "a la carte" package" would be profitable, other than as a means of evading rate regulation;

(3) the subscriber is free to select which channels will be included in the package;

(4) subscribers are given notice that fully discloses their options, as well as fully discloses the total price (including related equipment charges) associated with exercising any of these options; and

(5) an insignificant percentage or number of channels in the package has been removed from regulated tiers.[265]

On the other hand, the following factors would weigh against allowing unregulated treatment of collective offerings of "a la carte" channels:

(1) the introduction of the "a la carte" package results in avoiding rate reductions that otherwise would have been required under the Commission's

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[264] Thus, for example, if the total number of channels available to subscribers, including channels in the "a la carte" package, increases and the price for all offerings, including the package, remains the same, the Commission will be less likely to consider the package an evasion of rate regulation, provided that factors that would militate against nonregulated treatment, such as removal of channels from regulated tiers, are not significantly present.

[265] What percentage is "insignificant" will be determined by the Commission on a case-by-case basis.

rules;

(2) a significant percentage[266] or number of channels in the package were removed from regulated tiers;[267]

(3) the package price is so deeply discounted when compared to the price of an individual channel or the sum of the prices of the individual channels that it does not constitute a realistic set of service choice because subscribers will not have any realistic options other than subscribing to the package;[268]

(4) the channels taken from regulated tiers have not traditionally been marketed "a la carte";

(5) an entire regulated tier has been eliminated and turned into an "a la carte" package;

(6) the subscriber must pay a significant equipment charge to purchase an individual channel in the package;

(7) the subscriber must pay a "downgrade charge" (an additional charge) to purchase an individual channel in the package;

(8) the "a la carte" package includes channels that were removed from lower tiers of channels, so that subscribers to those lower tiers are required to buy one or more intermediate tiers in order to receive the same channels;

(9) subscribers are automatically subscribed to the "a la carte" package through, for example, such means as negative option billing; and

(10) the affected programmers object to the restructuring of their services into "a la carte" packages.

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[266] See supra note 264.

[267] In assessing this factor, regulators may consider whether including some previously regulated channels may be necessary for the successful marketing of the new package.

[268] For purposes of determining whether packages are deeply discounted, we may look at the industry's traditional discounting practices.

No single factor will necessarily be dispositive in any case. Rather, we will assess the totality of the circumstances, analyze whether one or more of the foregoing factors is present, and determine whether the offering intentionally, or in effect, constitutes an evasion of rate regulation.

197. Under our requirements for setting initial regulated rates, the rate for a regulated program service tier will be determined in part by the system's total revenues for all regulated tiers and the total number of regulated channels it offers.[269] Similarly, our methodology for adjusting capped rates for adding or deleting channels from a regulated tier is determined in part by the total number of regulated channels.[270] Thus, local authorities will need to determine the total number of regulated channels offered by the operator in order to properly set rates for the basic service tier. This will require a determination of whether any collective offerings of "a la carte" channels should be considered a regulated tier. Accordingly, we will permit local authorities to make initial determinations as to whether a collective offering of "a la carte" channels should be considered a regulated tier, even if the collective offering would be a cable programming service tier if it were regulated.[271]

198. Under the requirements that we are adopting, local authorities may, at their option, make an initial decision addressing only the regulatory status of any "a la carte" package at issue. The franchising authority must make this initial decision within the 30 day period for reviewing basic cable rates and equipment costs, or within the first 60 days of an extended 120 day period (if the franchising authority has requested an additional 90

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[269] See supra paras. 78, 82.

[270] We establish and explain our "going-forward" methodology for adjusting capped rates for the addition and deletion of channels from regulated tiers in the Fourth Report and Order, infra, at paras. 245-249.

[271] FCC Form 1215 requires that operators fully describe any collective offerings of "a la carte" channels offered in the franchise area. FCC Form 1215 must also be filed along with each Form 1200 setting initial rates and Form 1210 updating rates. Local authorities and the Commission, therefore, will be able to determine in individual rate cases whether any "a la carte" packages are relevant to necessary rate determinations.

days).[272] The franchising authority shall provide public notice of its initial decision within seven days pursuant to local procedural rules for public notice. Operators or consumers may make an interlocutory appeal of this initial decision to the Commission within 14 days of the initial decision.[273] (Within 14 days of the initial ruling, an operator shall provide notice to the franchising authority whether it will, or will not, make such an appeal.) The Commission will rule expeditiously on these appeals, and the local authority may then proceed with its local rate case in light of the Commission's decision on the interlocutory appeal.

199. Alternatively, local authorities may make any necessary "a la carte" determination as part of their final decision setting rates for the basic service tier. That decision may then be appealed to the Commission as provided under current rules concerning appeals of local decisions to the Commission. In any appeal of a local decision, the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings. The Commission will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the tier in question. Local authorities may also request that the Commission make the initial "a la carte" decision by means of a petition for declaratory ruling.[274] These

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[272] See 47 C.F.R. Section 76.933(a);(b)(1).

[273] This limited initial decision will toll time the periods under Section 76.933 of our rules within which local authorities must decide local rate cases. The time period will then begin running again seven days after the Commission rules on the interlocutory appeal, or seven days following the expiration of the period in which an interlocutory appeal may be filed. For example, if a cable operator offering a package of "a la carte" channels makes its rate filing on May 15, 1994 and the franchising authority makes an initial decision regarding the regulatory status of the package on June 1, 1994 (and provides required notices to the operator and subscribers), the remainder of the 30-day period (required under 47 C.F.R. Section 76.933) is tolled until either June 22, 1994 (14 days to appeal plus seven day grace period) -- if no appeal is filed, or until seven days after a Commission ruling on the interlocutory appeal. Thus, if the Commission were to decide the matter on August 1, 1994, the 30-day period in which franchising authorities must review rate filings would resume running on August 8, 1994.

[274] Filing such a request for declaratory ruling will also toll the time periods in which the local authority must make its decisions. See supra note 273.

provisions for local determination of "a la carte" issues will facilitate local authorities setting rates for the basic service tier while providing for Commission oversight of local decisions that could affect the regulatory status of cable programming services tiers.

200. We will monitor our treatment of collective offerings of "a la carte" channels. If it appears that they are not adequately fulfilling the purposes of the 1992 Cable Act, we will promptly revisit them.

D. Small Systems

1. Small System Administrative Relief

a. Background

201. The Cable Act of 1992 requires the Commission to develop and prescribe cable rate regulations designed "to reduce the administrative burdens and cost of compliance for cable systems with 1,000 or fewer subscribers."[275] In implementing this section, we are guided both by the explicit statutory mandate and by the view that regulatory requirements should generally be no more burdensome than necessary to achieve full compliance. We are particularly concerned about the administrative burdens imposed on small systems, whose more limited revenue base and smaller clerical staff may make them less able to absorb administrative costs.[276]

202. We took a first step at providing administrative relief for small systems when we adopted our current rate regulations. Specifically, in the Rate Order, we authorized franchising authorities to permit small systems to certify that their rates for basic service and equipment are reasonable under our rate standards, and permitted (and encouraged) franchising authorities regulating the same

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[275] Communications Act, Section 623(i), as amended, 47 U.S.C. § 543(i). In our Cost Proceeding we have simplified cost-of-service procedures for small systems. See Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 93-215, FCC 94-39 (adopted Feb. 22, 1994).

[276] Many small systems, especially independent small systems, serve rural and, often, less affluent Americans. We wish to ensure that our regulatory requirements provide the benefits of the 1992 Cable Act to all portions of the country.

small system to file joint certifications.[277] We subsequently decided to take a more extensive look at the issue of regulatory relief for small systems, and at the same time stayed the effectiveness of rate regulation for small systems pending our review of the regulatory requirements applicable to them.[278] We sought comment to supplement the record concerning possible additional measures to reduce administrative burdens on small systems.[279] In addition, we asked whether we should differentiate between small systems owned by small multiple system operators ("MSOs") and those owned by larger MSOs when crafting administrative relief.[280]

b. Comments

203. In response to the Rate Order, many petitioners sought reconsideration of our initial effort to grant small systems some form of administrative relief.[281] These petitioners contend that we did not take sufficient steps to ease the burdens of complying with rate regulation for small systems, as we had been directed to do by Congress. To support their claims, petitioners assert that cable rate regulation burdens fall disproportionately on small systems, which are least able to absorb the additional regulatory costs. They claim that small systems do not have the expertise, nor are they able to afford to hire experts, to prepare the analysis and forms necessary under rate regulation. They also claim that per subscriber costs are higher for small systems, which usually serve less densely populated rural areas and have smaller subscriber bases over which to spread costs. Moreover, they claim that small

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[277] See Rate Order, at para. 77. Joint certification is permitted for all communities served by the same system or by different systems; it is not limited to small systems. Id. at paras. 77-78.

[278] Stay Order/Further Notice, 8 FCC Rcd 5585 (1993).

[279] We also sought comment with regard to reducing the regulatory burdens for small cable systems when making cost-of-service showings in the Cost-of-Service Notice, 58 FR at 40773-74. To the extent that comments filed in MM Docket No. 93-215 address the reduction of regulatory burdens on small systems in general, they will be considered herein.

[280] Stay Order/Further Notice, 8 FCC Rcd at 5589.

[281] E.g., Petitions for Reconsideration filed by Coalition of Small System Operators ("Coalition"), Cable Services, and Community Antenna Television Association, Inc. ("CATA").

system operators must deal with more franchise authorities and face higher programming costs. Finally, they contend that revenue sources are limited for small systems. They attribute this financial limitation to the fact that small systems gain a smaller percentage of their revenues from unregulated programming services, such as premium channels and pay-per-view events. They contend that small systems generally do not have the technical ability to provide pay-per-view programming, and assert that advertising revenue is very limited as an alternative revenue source.

204. Most commenters responding to the Stay Order/Further Notice advocate treating small systems affiliated with multiple system operators ("MSOs") the same as independent small systems. These commenters contend that the 1992 Cable Act does not permit different treatment of MSOs and requires that all small systems receive relief from regulatory burdens. Moreover, commenters cite floor debate in the House where a proposal to increase the size of small systems from 500 to 1,000 subscribers was opposed because it would not exclude MSOs from its coverage, but was nevertheless adopted.[282] These commenters further contend that all but the very largest MSOs lack large corporate administrative staffs, centralized data processing, billing, management, engineering and construction support, and volume discounts on programming and equipment.

205. Some commenters claim that regulatory burdens are particularly high on small MSOs, which may have dozens or hundreds of small systems, each subject to separate rate calculations. Moreover, they point out that the regulatory burden of preparing FCC Form 393 and/or a cost-of-service showing is incurred at the franchise level. Thus, they argue, small MSOs which have many small systems serving various franchise areas face regulatory costs equal to, or greater than, independent small systems.

c. Discussion

206. Our rate regulations require systems electing the benchmark approach to setting rates to reduce their September 30, 1992 rates by the 17 percent competitive differential and then adjust the resulting rate forward for inflation, external costs and changes in the number of regulated channels offered by the system.[283] Systems must also establish unbundled equipment charges based on actual

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[282] See 138 Cong. Rec. H-6525 (daily ed. July 23, 1992).

[283] See supra paras. 114-115.

costs.[284] Completing our required benchmark forms can impose burdens on small operators, especially the various calculations required to unbundle equipment charges from program charges and set the former at actual cost. The record suggests that it is these equipment computations which impose the most significant burden in the rate-setting process.[285]

207. Our rate requirements are designed to achieve rates for regulated cable service and equipment that will best fulfill the purposes of the Cable Act of 1992. We believe that subscribers of small systems should be able to obtain the benefits of these regulatory requirements to the same extent as subscribers of larger systems. At the same time, it may be more difficult for small systems to comply with these requirements in the same time frame as larger operators. Accordingly, on reconsideration, we are adopting rules in addition to those established in the Rate Order that will provide administrative relief for small systems but that will also, as described below, achieve substantial compliance with rate regulation requirements.

(i) Streamlined Rate Reductions

208. As noted, under our revised benchmark rules, regulated cable systems must establish rates based on September 30, 1992 rates, as reduced by the competitive differential and then adjusted forward by inflation, changes in the number of regulated channels offered, and external costs. Generally speaking, when they become regulated, small systems are subject to these requirements unless they are eligible for transition relief.[286] Such systems must also establish unbundled equipment charges based on actual cost.

209. In order to permit small systems to implement competitive rate reductions that will benefit subscribers while reducing administrative burdens, we will permit eligible small systems, as defined below, to reduce their rates under a streamlined approach instead of using the

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[284] See Rate Order at para. 287-88.

[285] National Cable Television Association ("NCTA") Comments at 5-6 (August 31, 1993).

[286] Small systems may be eligible for transition relief -- and not be required to immediately apply the full competitive differential -- either because they are owned by small operators or because they charge relatively low prices. See supra at para. 117-126.

benchmark methodology set forth in FCC Form 1200. Specifically, small systems owned by eligible operators may elect to make rate reductions by reducing each billed item of regulated cable service by the competitive differential in lieu of following our more comprehensive rate regulation rules.[287] Thus, operators may reduce the billed charge for each tier of regulated service by the competitive differential. The reduction will be from charges in effect as of March 31, 1994. The amount of the reduction will be 14 percent, which approximates the amount of the competitive rate reduction that would be applicable to many small systems that have not been regulated and that therefore did not implement any rate reductions under our initial rate regulations.[288]

210. Similarly, under the requirements we are establishing today, small systems electing to reduce rates in this manner must apply the 14 percent reduction to each regulated equipment charge appearing on subscribers' bills. Thus, under this approach, eligible small systems are not required to unbundle equipment and installation charges from their programming service charges, or to set equipment and installation charges at actual cost.[289]

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[287] This relief will be available only to small systems owned by eligible MSOs and independent small systems, as defined below.

[288] This percentage reduction roughly approximates what the required rate reduction would be if the small system were required to reduce its September 30, 1992 rates by the full competitive differential of 17 percent and those rates had then been floated forward to adjust for the three percent inflation that occurred between September 20, 1992 and September 1, 1993. We recognize that a line-item reduction of 14 percent is not as precise a mechanism for setting regulated service and equipment rates as the calculations set forth in FCC Forms 393 and 1200. For example, unlike the rate calculations set forth in Forms 393 and 1200, the simple 14 percent reduction does not accommodate changes in external costs and the number of channels that may have occurred since September 30, 1992. We nevertheless believe that this reduction serves as an appropriate approximation measure of competitive rate reductions that will produce rates that are reasonable for the small system and its subscribers alike while achieving the goal of reducing administrative burdens for small systems.

[289] 47 C.F.R. 76.923. Thus, if a small system electing this option has rates for a basic service tier, an enhanced tier, remote control rental, additional outlet charge and an installation charge, each of these components of the monthly bill

211. We believe that these rate reductions will be easy to implement in that they merely involve application of a percentage reduction to each billable charge rather than the more extensive calculations set forth in FCC Form 1200. At the same time, the reductions will ensure that the subscribers of small systems pay reasonable regulated rates.

212. However, as stated, we believe that small systems ultimately can and should establish regulated rates on the same basis as other operators. Thus, this streamlined alternative to implementing rate reductions will be a temporary approach to setting rates prior to full compliance. In our Cost Proceeding, we have decided to examine whether we should establish possible average cost schedules for the provision of equipment, as well as average cost schedules generally for provision of regulated program service.[290] These schedules could be used by small systems to set rates instead of requiring them to identify and evaluate their own costs or make the calculations required under our benchmark rules. Thus, these schedules could afford significant administrative relief for small systems as well as all systems generally.

213. We believe that when average cost schedules for equipment are developed, small systems that have elected to make streamlined rate reductions should be required to develop rates based on September 30, 1992 rates with specified adjustments as required of cable systems generally. This opportunity to implement streamlined rate reductions, subject to full compliance later, will give eligible systems a sufficient opportunity to prepare for compliance while affording consumers significant benefits in the interim.[291] Thus, we will require small systems that have elected to make streamlined rate reductions to establish rates based on full compliance with our rules at

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would be reduced by 14 percent in lieu of its completing FCC Form 1200 and making the rate calculations required therein.

[290] See Cost Proceeding.

[291] Operators will not be subject to refund liability to the extent that rates established during the interim period exceed what would be permitted under regulations applicable to cable operators generally. By the same token, undercharges during this period may not be recovered prospectively from subscribers.

the time we establish average cost schedules for equipment.[292]

214. If a small system elects streamlined rate reductions, the permitted rate for a tier will be the rate for the tier in effect on March 31, 1994 minus 14 percent.[293] The rate will then be capped at that level and the price cap requirements applicable to cable systems generally will govern rates for the tier. Thus, capped rates may be adjusted annually for inflation, quarterly for external costs, and quarterly for additions and deletions of channels.[294] Small systems must use FCC Form 1211 when justifying such rate changes to local or federal regulators.

215. Our provisions for streamlined rate reductions are intended to provide administrative relief for small systems because small systems are less likely to have the

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[292] We will specify the time period for compliance in the decision adopting average cost schedules for equipment. The Commission may alternatively require full compliance with our rate regulations at an earlier date if we experience delays in developing average cost schedules for equipment. As indicated, the 1992 Cable Act requires that operators "establish, on the basis of actual cost," the rates charged for equipment and installation. Communications Act Section 623(b)(3), 47 U.S.C. Section 543(b)(3). We believe that the statutory mandate that the Commission reduce administrative burdens on small systems permits the Commission to defer compliance with this provision in order to reduce the administrative burdens of full compliance. Thus, average equipment schedules will permit establishment of rates for equipment based on costs in full compliance with the statute, and deferral of full compliance will reduce administrative burdens. Accordingly, our deferral of unbundling and actual cost requirements is consistent with the statute.

[293] A small system that has violated the rate freeze and subsequently makes a 14 percent streamlined rate reduction from rates established in violation of the freeze, will be required to later adjust rates to account for any overcharges that resulted from the freeze violation. The Commission's stay of rate regulation for small systems does not affect the application of the rate freeze to them. Small systems remain subject to the rate freeze until May 15, 1994.

[294] Rates set under the streamlined rate reduction approach will not be based on average rates across all regulated tiers as is the case for setting initial regulated rates for cable operators generally. However, our price cap requirements, including adjustments for inflation, external costs, and adjustments for changes in regulated channels, will nonetheless be applied to the resulting tier charge.

resources to comply with our rate reductions in a timely fashion. On the other hand, some small systems as defined in the 1992 Cable Act may be affiliated with larger companies with the resources to fully comply with our rate requirements. Accordingly, we are establishing standards of eligibility for streamlined rate reductions designed to limit their availability to larger companies.

216. Streamlined rate reductions will only be available to independent small systems (i.e., those that are not owned by or affiliated with other cable systems)[295] and to small systems owned by those MSOs that have 250,000 or fewer total subscribers, own only systems with less than 10,000 subscribers each, and have an average system size of 1,000 or fewer subscribers.[296] The 250,000 subscriber cap ensures that larger MSOs do not benefit from a form of administrative relief that they may not need because they are likely to have the resources necessary to expeditiously establish compliance with rate regulation requirements.[297]

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[295] We do not believe that small system administrative relief should be available to companies that have a significant financial or other relationships with larger companies that would enable them to more readily comply with our rate requirements than would smaller companies. Accordingly, we will limit streamlined rate reductions to those companies that meet our eligibility criteria and that are not affiliated with larger companies. For purposes of measuring affiliation, we will employ the same criteria we use for determining eligibility for transition relief. See supra para. 120. Thus, we will not permit streamlined rate reductions by companies in which a larger company holds more than a 20 percent equity interest (active or passive) or over which a larger company exercises actual working control (such as through a general partnership or majority voting shareholder interest).

[296] Eligibility for streamlined rate reductions will be determined by application of our eligibility criteria to the company as it existed on March 31, 1994. This will eliminate incentives for operators to change affiliation in order to become eligible for streamlined rate reductions.

[297] We estimate that streamlined rate reductions will be available to approximately 4,845 small systems which represent 42 percent of the 11,529 cable systems in the United States. The approximately 1.4 million cable subscribers served by those small systems should ultimately benefit from any cost savings resulting from such relief. These 4,845 small systems include approximately 539 independent small systems serving approximately 200,000 subscribers and 4,306 small systems owned by 508 MSOs meeting our eligibility criteria for streamlined rate reductions. These

The 10,000 and 1,000 subscriber limits help tailor streamlined rate reductions to small systems that are owned by those operators that are most likely to own numerous small systems. The record strongly suggests that it is these operators that face the highest administrative costs of complying with our benchmark regulations because they own so many systems and all of their systems serve fairly small subscriber bases (i.e., none is larger than 10,000 subscribers). Streamlined rate reductions will not be available to any system that has already restructured its rates in an effort to comply with our rules, since such a system has demonstrated that it does not need the administrative relief that the streamlined rates reduction process is intended to provide.

217. Small systems electing to implement streamlined rate reductions must provide written notice to that effect to their subscribers, as well as to the local franchising authority with respect to the basic service tier and the Commission with respect to a cable programming service tier. This notice must be provided within 30 days after the small system becomes subject to regulation. The small system must then implement the streamlined rate reductions within 30 days after the notification has been provided.

(ii) Company-Wide Averaging of Equipment

218. Under our benchmark rules, operators are required to aggregate expenses and revenues, including equipment and installation costs, at the franchise, system, regional or

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4.306 systems serve 1.2 million cable subscribers, representing 39.8 percent of the 10,816 MSO-owned cable systems in the United States and 2.3 percent of the 54.4 million cable subscribers served by MSOs. These data were obtained from the Cable Television Factbook database purchased by the Commission in electronic format. This information is available in printed form in the Cable Television Factbook. The estimate for independent small systems may be slightly overstated due to the Factbook database's inclusion of systems that only distribute broadcast signals which are not jurisdictionally "cable television systems" for purposes of these regulations. The Factbook database indicates that there are 11,529 cable systems in the United States serving approximately 55.9 million cable subscribers. However, we are unable to ascertain from the database whether nine systems (2,642 subscribers) are MSO-owned or independent cable systems. Accordingly, these nine systems and their correlating number of subscribers are not reflected in the number of MSO-owned and independent systems but are included in total systems and total subscribers. The data does not reflect application of our attribution rules.

company level in accordance with the operator's practices as of April 3, 1993.[298] In order to reduce administrative burdens associated with setting unbundled rates for equipment based on actual costs, we are permitting operators of small systems to average the equipment costs of its small systems at any level, or combination of levels, regardless of the operator's practices as of April 3, 1993, subject to safeguards designed to protect subscribers from unusual rate changes.[299] Under this approach, a cable operator of any size may average the equipment costs of all its small systems, or only some of them, for purposes of developing unbundled equipment charges that are set at actual cost. This process will permit operators to select a level of averaging that enables them to develop equipment charges in accordance with our rules, but also involves the least administrative burden. Specifically, it may be less burdensome for some operators to average the equipment costs for their small systems at a level different from the level at which they generally averaged their costs on April 3, 1993. This flexibility therefore should reduce the overall effort and expense involved in separating equipment costs from programming costs when calculating individual small system rates.

219. We recognize, however, that setting equipment charges at a different level of cost averaging than the operator was employing on April 3, 1993 could involve rate changes both for equipment and programming service charges, since permitted rates for equipment and programming service charges are based on aggregate programming service and equipment charges as of September 30, 1992. In order to prevent sudden rate changes that could harm subscribers, we are establishing several safeguards that operators of small systems must follow when developing average equipment costs for those systems. First, the flexibility in averaging equipment costs will apply only to the operator's small systems, rather than the larger systems it owns. Second, it will only be permitted for equipment, as opposed to installation charges. This is because we believe that equipment charges are less likely to vary significantly between systems, whereas installation charges are more

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[298] See 47 C.F.R. §76.924(c); First Recon. Order, at para. 65, n. 96.

[299] Under this approach, equipment costs would be based on the actual costs experienced by the operator averaged at a level selected by the operator. This rate setting approach is different than setting rates based on average equipment schedules, which would involve setting an individual operator's equipment costs based on average industry costs.

dependent on local labor and other costs that can be quite different in different communities. Third, operators may establish average charges only for similar types of equipment. Thus, for example, average charges may be established only for similar types of remotes or converters. Finally, when justifying equipment charges averaged across the operator's small systems, the operator must present a general description of the averaging methodology employed and a justification that it produces reasonable equipment rates.[300] Based on the showing, local franchising authorities and the Commission may, for good cause, require that the operator set equipment rates in accordance with existing rules. We also note that in the Cost Proceeding, we are soliciting comment on what level of cost averaging we should require or permit operators to employ in setting rates.[301] We may alter in that proceeding the cost averaging approach established today. We will additionally monitor the impact of our action today to assure that it does not harm subscribers.[302]

220. As indicated, this administrative relief provides a methodology for setting unbundled equipment charges based on actual cost. As such, it will be available to all cable operators owning small systems. We see no reason to limit the eligibility for this small system relief to operators of a certain size. Moreover, this relief is not intended as an interim measure. Rather, operators may set equipment rates based on company-wide average costs subject, as indicated, to any decision on cost averaging the Commission may establish in the Cost Proceeding.

221. We believe that the 1992 Cable Act affords us sufficient discretion to adopt the dual approach described above, which is designed to "reduce administrative burdens

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[300] Where there is good cause, a franchising authority (or the Commission, where relevant) that believes that the averaging methodology does not produce reasonable equipment rates, may require the operator to set equipment rates based on our current requirements.

[301] See Cost Proceeding.

[302] Section 623(b)(3) of the Communications Act of 1934, 47 U.S.C. § 543(b)(3) requires that equipment charges be based on actual cost. That section does not specify a particular method for determining the actual cost of equipment, or whether equipment costs may be based on average company or industry costs. We believe that permitting operators to set equipment charges based on average costs comports with the statutory mandate that equipment charges be based on actual costs.

and costs of compliance" for all systems that have 1,000 or fewer subscribers. The statute does not mandate that we provide the same level or magnitude of relief to every small system regardless of the resources or affiliation with a large operator. Notably, we have tailored the relief on the basis of our evaluation of the resources and capabilities of different types of small systems. We have balanced the public interest benefits of unbundling equipment and installation charges from programming charges against the administrative burdens on such systems. We find that varying degrees of relief are appropriate for small systems owned by different size operators, although every small system is afforded relief of some kind. Moreover, the fact that some members of Congress unsuccessfully objected to the provision regarding administrative relief for systems with less than 1,000 subscribers because MSO-owned systems would fall within this category, does not demonstrate that Congress intended to limit our flexibility in fashioning appropriate administrative relief. We thus conclude that our dual approach is consistent with the 1992 Cable Act.

(iii) Other Proposals for Administrative Relief

222. Several petitioners, including Arizona Cable Television Association, et al. ("Arizona"), Mountain Cable ("Mountain"), Cable Services, and CATA, advocate complete exemption from rate regulation for all systems that are classified as small systems.[303] As stated in the Rate Order, "[w]e do not believe that our responsibility under the Cable Act to ensure that consumers are protected from unreasonable rates permits us totally to exempt small systems ... from rate regulation." Id. at para 463. The language of the statute itself indicates that the Commission cannot entirely exempt small systems from rate regulation. First, as noted in the Commission's discussion in the Rate Order, Section 623(b)(1) of the Communications Act requires that the Commission's rules protect subscribers of "any" cable system not subject to effective competition. Thus, absent a statutory exemption, the regulatory requirements of the law apply to all systems, including small systems. Second, the statute expressly addresses special regulatory treatment of small systems in Section 623(i), but that Section authorizes the Commission only to "reduce" the administrative burdens and cost of compliance for small systems. Use of the term "reduce" implies that some amount of regulatory burden, although lessened, would remain. Similarly, because it is

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[303] Arizona Cable Television Association et. al. Petition for Reconsideration at 4; Mountain Cablevision, Inc. Petition for Reconsideration at 2; Cable Services Petition for Reconsideration at 1; CATA Petition for Reconsideration at 5.

the "cost of compliance" that is to be reduced, it is apparent that some compliance is intended. If Congress had intended to exempt small systems entirely, or afford discretion to eliminate all burdens on such systems, it would have so stated.[304] Accordingly, our efforts to reduce regulatory burdens and cost for small systems may not include complete exemption.

223. We also reject the "reasonable net revenue" test proposed by the Coalition and CATA.[305] This test would exempt those systems with a net income margin[306] of less than 15.5% from rate regulation. We believe that there is no dependable connection between this proposed test of profitability and a presumption that a small system's rates are reasonable. There are simply too many factors that can affect the gross revenue and net revenue calculations that are not necessarily related to reasonableness of rates. The expenses of the system may be unusually high for reasons that would normally not be acceptable in cost based rate regulation. For instance, the system may be using accelerated depreciation or the system may have unreasonable salary or other expenses paid to owners. Moreover, we foresee numerous practical problems in implementing such an approach. For example, we are concerned that efforts to verify the legitimacy of "net revenue" figures, to obtain additional information and to provide safeguards sufficient to maintain the integrity of a net revenue test would add such complexity as to defeat the purpose of regulatory

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[304] The legislative history also supports the conclusion that small systems may not be totally exempted from rate regulation. For instance, during floor debate a sponsor of the legislation, Representative Slattery, stated that "we are not talking about exempting ... the small systems from regulation." 138 Cong. Rec. H6526 (daily ed. July 23, 1992). In addition, the dissenting views appended to the House Report states:

> Rather than exempt small systems from the economic and administrative burdens of rate and equipment [regulations], the bill merely directs the FCC to take into account the administrative burdens on small systems in adopting such regulations.

H.R. Rep. No. 628, 102d Cong., 2d Sess. 187 (1992).

[305] CATA Petition for Reconsideration at 7; Coalition of Small System Operators Petition for Reconsideration at 10-13.

[306] These commenters would calculate net income by subtracting operating expenses, interest payments, and depreciation from gross revenues.

simplification for small systems. Accordingly, we do not believe that this option is an appropriate way to reduce the regulatory burdens on small systems.

224. Arizona would require (rather than merely encourage) multiple franchise authorities regulating a single small system to jointly file for rate regulation certification.[307] While we continue to encourage such joint certification, we do not believe that it is appropriate to override individual franchising authorities' prerogatives to make their own rate-setting determinations.

225. Finally, CATA proposes that we delay small system rate regulation pending a study of the effects of the benchmark, and that small systems be permitted to charge a rate within some percentage of the average national charge.[308] We do not believe that the proposal to allow small systems to charge a rate within some percentage of an average national charge has merit. Such a proposal would merely create an alternative benchmark rate and would not necessarily be any simpler to administer. We also do not intend to delay rate regulation for small systems while we study the effect of our rate regulations on other systems. We note that we have already provided a transition mechanism for small operators. Moreover, by adopting the new rate-setting methodology and the average equipment cost approaches contained herein, we provide an easy, less burdensome means for small systems to comply with rate regulation. Any further delay in rate regulation for small systems -- other than those provided in our transition rules -- would be unnecessary.

2. Headend vs. Franchise Area Definition of Small Systems

226. In response to the Stay Order/Further Notice, many commenters argue that the definition of a small system should be changed from a "headend" to a "franchise area" basis. They contend that the franchise area definition would be consistent with the definition of cable system for other rate regulation purposes because regulated rates are determined on a franchise area basis. They also contend that the use of a franchise area definition will not place artificial barriers on the technical integration of

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[307] Arizona Cable Television Association et. al. Petition for Reconsideration at 8-9.

[308] CATA Petition for Reconsideration at 7-8.

different franchise areas with a single headend.[309] Some commenters state that they have stopped such technical integration and consolidation because of the concern that they would lose their small system classification.[310]

227. We continue to believe that determining small system size based on a system's principal headend, including any other headends or microwave receive sites that are technically integrated to the system's principal headend, best harmonizes our small system rule with most of our existing regulations on cable system size. For example, the existing 1,000 subscriber exemptions in the network non-duplication and public inspection file rules are based on a system's headend rather than franchise area.[311] To use a franchise area definition would result in some segments of a single integrated cable operation receiving rate treatment different from other segments of the same operation. Moreover, if we changed the definition of small system to a franchise area basis, we would significantly increase the number of instances in which an operator would qualify for regulatory relief. However, many of these "small systems" would merely be franchise areas with 1,000 or fewer subscribers that were part of integrated cable systems serving much larger numbers of subscribers. Additionally, we continue to believe that the benefits from consolidated operation in a technically integrated headend sufficiently outweigh the benefits of classification as a small system so that future consolidation and improvements will not be unduly inhibited.

3. Termination of Rate Regulation Stay for Small Systems

228. As indicated, in the Stay Order/Further Notice, we stayed rate regulation of small systems until we further addressed small system issues on reconsideration. We have now completed our evaluation of small system issues. In addition, small systems have been afforded a substantial period of time to prepare for rate regulation, and we see no reason to delay for their subscribers the benefits of rate regulation. Therefore, we will terminate the stay for small systems as of May 15, 1994, the effective date of the rules adopted herein. Local authorities may provide initial notices of regulation to small systems as of that date, and

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[309] Medium-Sized Operators Group Comments at 6-7; Coalition of Small System Operators Comments at 7-9.

[310] Mullin, Rhyne, Emmons and Topel Comments at 2.

[311] See 47 C.F.R. Sections 76.95, 76.305.

the Commission will accept newly filed complaints concerning cable programming services tiers provided by small systems as of that date.[312] Small systems must then submit a rate justification (or otherwise file a permitted response, such as a written notification that it intends to use the streamlined rate reduction process) within the 30 days prescribed in our rules.[313] In addition, the statutory 180-day window for filing complaints concerning rates for cable programming services tiers in effect on May 15, 1994 will commence running on that date for small systems.[314]

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[312] Local authorities may have provided initial notices of regulation to operators during the stay and the Commission has accepted complaints for cable programming services tiers provided by small system since September 1, 1993. These notices and complaints will be considered as having been made or filed, respectively, as of May 15, 1994, the effective date of our new rules.

[313] See Rate Order at paras. 116, 356. Small system operators previously subject to the stay may obtain an extension of time to establish compliance with rate regulations if they can show that timely compliance would result in severe economic hardship. Requests for extension of time should be addressed to the local franchising authority concerning rates for the basic service rates and to the Commission concerning rates for a cable programming services tier. Possible circumstances showing severe economic harm might be based on prior commitments with regard to programming contracts or actual plans in progress for significant improvements to its plant and equipment, or an unusually severe impact on the financial condition of the company that could be caused by rate reductions. However, an extension of time to comply will not toll the effective date of rate regulation for small systems or eliminate refund liability for rates that exceed permitted levels after the effective date of our rules.

[314] Section 623(c)(1)(B) of the Communications Act, 47 U.S.C. Section 543(c)(1)(B), requires the Commission to provide procedures for the receipt, consideration and resolution of complaints from any subscriber, local franchising authority or other state or local government entity concerning unreasonable rates for cable programming services. Section 623(c)(3) of the Communications Act, 47 U.S.C. Section 543(c)(3), provides that except during the 180 day period following the effective date of rate regulations complaints may be filed only after a reasonable period following a rate increase. In the Rate Order, the Commission determined that that period would be forty-five days. Our rate regulations concerning small systems have not gone into effect. Rate Order at para. 333. Therefore, the 180 day statutory period for filing complaints concerning rates, other than for rate increases, will commence running on the effective

III. Fourth Report and Order

A. Introduction

229. In this Fourth Report and Order, we adopt a methodology for adjusting capped rates when channels are added to, or deleted from, a tier of regulated cable service. We also decline to modify our benchmark requirements to account for system upgrades initiated or completed shortly before the onset of rate regulation of cable service.[315]

230. In our April, 1993 Rate Order, we provided that cable operators may pass through, after setting their initial regulated rates for a tier, any increases in programming costs for regulated services that exceeded inflation.[316] The Rate Order did not, however, specify how the benchmark approach should be used to determine rates when channels were added or deleted to regulated service tiers. In the Third Further NPRM, we thus sought comment on how we should adjust capped rates to reflect channel additions or deletions. We now adopt in this decision a methodology for adjusting rates in these circumstances. This approach permits operators to adjust their rates by specified per-channel amounts that apply to channels that are added, dropped, or moved from one tier to another. As such, the methodology is an easy way to adjust capped rates that will facilitate programming changes. It also permits

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date of our revised rules.

[315] We solicited comment on this issue in the Third Further NPRM in this proceeding. First Order on Reconsideration, Second Rate Order, and Third Further Notice of Proposed Rulemaking ("Third Further NPRM"), MM Docket No. 92-266, FCC 93-428 (released Aug. 27, 1993), 58 FR 46718 (Sept. 2, 1993). The Third Further NPRM also solicited comment on what limitations should be adopted to govern operator discretion to select between the benchmark and cost-of-service approaches for purposes of setting initial regulated rates. That issue was addressed in the Third Report and Order, MM Docket No. 92-266, 8 FCC Rcd 8444 (1993), which required cable systems to choose a consistent approach (benchmark or cost-of-service for all tiers). The Third Further NPRM also solicited comment on whether we should establish external cost treatment for the costs of upgrades required by local franchise authorities. Third Further NPRM at paras. 153-154.

[316] Rate Order at para. 257. As discussed, para. 174 supra., we are modifying in this Order the methodology for calculating external costs and inflation.

operators to recover fully programming expenses.

B. Adjustments to Capped Rates for Addition and Deletion of Channels

1. Background

231. In the Third Further NPRM, we sought comment on what methodology should be adopted for applying the benchmark system to adjust capped rates when channels are added or deleted from regulated tiers.[317] We sought comment first on the regulatory goals that should guide our adoption of a methodology for addition and deletion of channels.[318] We tentatively concluded that the methodology we develop should achieve the objectives of protecting consumers from unreasonable rates while assuring the continued growth of the cable industry and the additional services that it can provide to subscribers.

232. We then solicited comment on three possible methodologies for adjusting capped rates when adding or deleting channels from a particular regulated tier. Under the first proposed method, the new charge for the tier would consist of the sum of: (1) the current permitted charge for the tier, and (2) a charge calculated by multiplying the benchmark rate by the number of new channels on the tier. Under this approach, the declining rate per channel reflected in the benchmark would be applied only to additional channels. The per channel charge for existing channels would not be adjusted downward to reflect the benchmark curve. We tentatively concluded that this approach should not be adopted because it would permit significantly higher rates; because it could not be readily used for setting rates when channels are deleted; and because it would permit tier pricing above the economies of scale observed in our Competitive Survey and reflected in the benchmark system.[319]

233. Under the second methodology proposed in the Third Further NPRM, the new permitted rate for a regulated tier when channels are added or deleted would be the benchmark per-channel rate multiplied by the new number of channels on the tier. This approach would assure that the benchmark curve is fully reflected in rates because the

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[317] A list of commenters responding to issues raised in the Third Further NPRM is included in Appendix A.

[318] Third Further NPRM at para. 136.

[319] Third Further NPRM at para. 137.

charge for the tier would be calculated by applying the benchmark rate to all channels on the tier.

234. In addition, by applying the benchmark per channel rate to calculate new rates instead of the operator's permitted per channel rate as calculated using FCC Form 393, this approach would bring systems whose rates were above the benchmark down to the benchmark when they added or deleted channels. At the same time, however, it would allow systems whose regulated rates were below the benchmark to bring those rates up to the benchmark simply by adding or deleting channels from regulated service. We tentatively concluded that this approach should not be adopted because it would create substantial disincentives for cable operators with rates above the benchmark to add channels and because it could create undue incentives for systems with below benchmark rates to add channels, permitting substantially increased rates for such operators.[320]

235. We tentatively concluded in the Third Further NPRM that we should adopt a third methodology, which we termed the "parallel track" approach. Under this approach, programming costs would be removed from an operator's permitted charge per tier. The remaining charge would then be adjusted to reflect the proportionate increase or decrease observed in the benchmark curve based on the new number of channels offered across all regulated tiers. The new level of programming expense for the tier would then be added back to the adjusted tier charge to obtain the new charge for the tier. We stated in the Third Further NPRM that this approach incorporates the downward sloping benchmark curve that we observe when operators in an unregulated environment added channels and thus passes on to subscribers the efficiencies and economies of scale reflected in the benchmark rates.

2. Regulatory Goals

236. Commenters expressing a view on this issue broadly agree with our proposed goals for the methodology for adjusting capped rates when channels are added or deleted from a regulated tier.[321] They state, for example, that the Commission should seek to preserve incentives for cable operators to provide additional programming services to consumers, while protecting consumers from unreasonable

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[320] Third Further NPRM at para 138.

[321] See, e.g., Disney Comments at 2; Viacom Reply Comments at 2-3; GTE Reply Comments at 2.

rates.[322] Several commenters suggested additional goals,[323] such as furthering increased diversity and local origination of programming[324] and promoting administrative ease. [325]

237. We conclude that our methodology for adjusting capped rates when channels are added or deleted from regulated tiers should be consistent with, and further implement, our general approach for regulation of cable service rates. Thus, our regulations governing adjustments to capped rates should preserve the competitive rates produced by our requirements for setting initial regulated rates, since rates closer to competitive levels will best serve consumers. Moreover, lower rates for goods and services can in many cases increase the quantities demanded, and can further increase output as suppliers seek to meet that demand. Thus, maintaining rates at reasonable levels as channels are added or deleted from regulated cable service will benefit the public by making available to consumers a greater quantity and range of services at lower prices.

238. In addition, we believe that the cable industry can, and should, continue to grow and provide new and additional services to subscribers. In particular, operators should be given incentives to participate fully in the development of an advanced telecommunications infrastructure. Accordingly, a goal of our "going-forward" methodology is to allow cable operators to grow and develop new facilities and services, including new and innovative regulated programming services. This goal is fully consistent with the views of commenters that our methodology should promote a diversity of programming. Our methodology should also seek to further the statutory goal of reducing administrative burdens on subscribers, operators, and regulators. We explain below how the going-forward methodology we adopt today meets these stated goals.

3. The Going-Forward Methodology

a. Comments

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[322] See, e.g., Disney Comments at 2.

[323] See, e.g., Liberty Comments at 2-3; NATOA Comments at 14-15.

[324] Liberty Comments at 2-3. See, e.g., Viacom Reply Comments at 2-3; Liberty Reply Comments at 3-4.

[325] See NATOA Comments at 14-15.

239. Several cable operators support the first alternative, arguing that it would provide the greatest incentives for operators to add channels because it permits the highest rates.[326] All operators expressing a view oppose the second approach arguing that it would provide significant disincentives for systems above the benchmark to add additional programming to regulated tiers.[327] Many operators support adopting the third alternative, the third alternative, provided certain modifications were made.[328] Several operators, however, oppose it.[329] They argue that the benchmark formula, and the underlying data on which it is based, are flawed and that, consequently, the formula cannot be incorporated into a methodology to set rates when channels are added or deleted from regulated tiers.[330]

240. A number of programmers oppose the first alternative on the ground that it would discourage cable systems from purchasing expensive programming because, as described in the Third Further NPRM, it would not take into account actual programming costs.[331] Programmers also strongly opposed the second option, arguing that it would provide significant disincentives for systems above the benchmark to add additional programming to regulated tiers.[332] The majority of programmers expressing support for one of the alternatives favor the third alternative, although many proposed modifications while expressing their

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[326] See, e.g., Time Warner Entertainment Comments at 2-3 (Sept. 30, 1993); Viacom International, Inc. Comments at ii (Sept. 30, 1993).

[327] See, e.g., Viacom International, Inc. Comments at 7 (Sept. 30, 1993); NCTA Comments at 2 (Sept. 30, 1993).

[328] See, e.g., Austin, Texas, et. al. Comments at 8-9 (Sept. 30, 1993); Falcon Cable TV Comments at 2 (Sept. 30, 1993); TCI Comments at 1 (Sept. 30, 1993); Tele-Media Entertainment Co. Comments at 1-2 (Sept. 30, 1993).

[329] See, e.g., Time Warner Entertainment Comments at 3-4 (Sept. 30, 1993).

[330] See Time Warner Entertainment Comments at 3-4 (Sept. 30, 1993).

[331] See, e.g., NBC Comments at 3 (Sept. 30, 1993); Liberty Media Corp. Comments at 7 (Sept. 30, 1993).

[332] See, e.g., Liberty Media Corp. Comments at 4 (Sept. 30, 1993); NBC Comments at 2-3 (Sept. 30, 1993).

support.[333] Programmers favor the third proposed methodology because in their view it reduces the disincentives for operators to purchase high quality programming contained in other approaches.[334]

241. A number of franchising authorities also support the third alternative.[335] Other franchising authorities oppose it because they believe that it would be difficult to administer.[336] They support the second alternative because they view it as producing lower rates and because they believe it would be simpler to administer.[337] A number of commenters favor permitting a mark-up on programming expense, arguing that this would encourage investment in new programming.[338]

b. Discussion

242. In addition to revealing a significant competitive differential that we will use to implement our revised benchmark approach, our Competitive Survey of industry rates as of September 30, 1992, established that, on average, charges per channel decrease as the number of channels offered by a system increases. This downward "curve" in per-channel rates may well reflect economies of scope and scale in the provision of regulated cable service. Using this curve in developing a going-forward methodology would benefit consumers by assuring that they receive the reduction in per channel rates that apparently arises as cable systems grow and add channels. At the same time, because the curve is based on observed per channel rates, we believe that a methodology that adjusts capped rates in

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[333] See, e.g., The Disney Channel Comments at 2-4 (Sept. 30, 1993); NBC Comments at 3-5 (Sept. 30, 1993).

[334] See, e.g., ARC Comments at 6-7 (Sept. 30, 1993); The Disney Channel at 2-4 (Sept. 30, 1993); NBC Comments at 3-4 (Sept 30, 1993).

[335] See, e.g., MCATC Comments at 3 (Sept. 30, 1993); Coalition Reply Comments at 9 (Oct. 7, 1993)(favor for the short term).

[336] See NATOA Comments at 14-16 (Sept. 30, 1993).

[337] See NATOA Comments at 14-16 (Sept. 30, 1993).

[338] See, e.g., Discovery Communications Inc. Comments at 8-10 (Sept. 30, 1993); Viacom Comments at 9-13 (Sept. 30, 1993); The Disney Channel Comments at 5-7 (Sept. 30, 1993); NBC Comments at 2-5 (Sept. 30, 1993); Joint Parties Comments at 9-11.

accordance with this curve will permit operators to continue to invest in the provision of cable service. Thus, incorporation of this curve in our methodology will help achieve our goals of protecting consumers and permitting operators to respond to marketplace forces for provision of new services.

243. We emphasize that cable operators have failed to provide concrete cost or other factual information showing that the observed pattern of rates voluntarily established by the industry in an unregulated environment will not permit recovery of costs when new channels are added, including through facilities upgrades.[339] For the most part, they merely offer generalized allegations that do no more than point out that the benchmark rate decreases on a per channel basis as the number of channels increases.[340]

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[339] For example, Liberty Media claims that the efficiency factor reflected in the benchmark is inappropriate for situations when channels are added, but does not give hard evidence as to why this is so. Liberty Media Comments at 8-11 (Sept. 30, 1993). Continental includes a one page exhibit showing upgrade costs in certain circumstances, but no data supporting the numbers or conclusions in the exhibit. Continental Comments at 14-15 (Sept. 30, 1993). Medium Operators contend, citing an Ernst & Young report, that while in some cases the benchmark captures the capital costs for providing video signals, on other occasions it does not. Medium-Sized Operators Comments at 3-4 (Aug. 4, 1993). However, Medium Operators do not provide adequate evidence to demonstrate that it is unreasonable to assume that benchmark rates permit operators to recover cost when channels are added. In fact, a number of Medium Operators' arguments, conclusions, and the applicability and methodology of the Ernst & Young study are questioned and disputed by the Coalition and a Jay Smith study attached as an exhibit to their comments. Austin, Texas, et. al. Comments at 1-8 and Exhibit A at 2-4 (Sept. 30, 1993). Cable Operators merely assert that operators adding channels incur greater costs and realize fewer efficiencies than operators that initially built a system with the same number of total channels as the upgraded system. Cablevision Industries Corp. Comments at 3-4 (Sept. 30, 1993).

[340] For these reasons, we are not persuaded that our going-forward methodology will be inadequate unless we provide for external cost treatment for associated upgrade or capital expenditures. We have previously rejected external cost treatment for upgrades. Rate Order, para. 256, n.608. In addition, we have separately provided a mechanism to adjust capped rates to recover the costs of upgrades. See Cost Proceeding. In that decision, we provided for a streamlined cost-of-service showing to permit operators to adjust rates by

Accordingly, we will adopt a methodology for adjusting capped rates that incorporates the downward curve of per-channel rates observed in our Competitive Survey. We also emphasize that those operators who believe that the rates determined under our new benchmark approach and the going-forward methodology we adopt, are inadequate when channels are added may make a cost-of-service showing in order to attempt to justify a higher rate.

244. The third alternative proposed in the Third Further NPRM is fully compatible with our revised benchmark formula and approach for setting regulated rates.[341] For the same reasons that our statistical and other improvements to the benchmark formula better estimate the competitive differential, the revised benchmark formula more accurately captures the curve of declining per channel rates as the total number of offered regulated channels increases.[342] Therefore, we can employ our new benchmark formula in a going-forward methodology, and it should permit operators to recover costs of providing additional channels while passing on to consumers the per-channel savings observed in our Competitive Survey.

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the net change in costs involved in upgrades. This streamlined showing will also be available to adjust rates for costs of upgrades required by local franchise authorities. Accordingly, we will not establish, or further consider, in this proceeding external cost treatment for upgrades generally, or for upgrades required by local franchise authorities.

[341] The first and second approaches for a going-forward methodology discussed in the Third Further NPRM presume identification of specific competitive rates such as those specified in the benchmark adopted in the Rate Order that would be used to set rates for some or all channels when channels are added to, or deleted from, a regulated tier. Thus, these approaches would use specific prescribed rates for calculating tier prices when channels are added. However, under our revised approach for setting regulated rates we have chosen not to identify specific competitive rates and instead require all regulated operators to reduce rates by the competitive differential, with the exception of those systems that qualify for transition treatment. Therefore, the first and second approaches are not compatible with our revised benchmark approach and cannot be adopted.

[342] In the Technical Appendix we explain and justify our new benchmark formula. We therefore reject arguments that our going-forward methodology cannot be based on that formula or underlying data.

245. Under the third alternative proposed in the Third Further NPRM, operators would subtract programming expenses from the permitted charge for each tier to establish a residual rate component for the tier. This is consistent with the requirements that we are adopting on further reconsideration for calculating all external costs and inflation adjustments.[343] This treatment will achieve identical results as the method specified in the Rate Order but will be simpler to administer. At the same time, the operator will be able to fully recover in going-forward rate calculations the actual level of programming expense incurred. This approach will assure that operators may respond to demand for programming and recover their costs when adding channels. Accordingly, we believe that of the alternatives discussed in the Third Further NPRM, the third alternative will best achieve our goals for a methodology for applying the benchmark system to adjust capped rates when adding or deleting channels.[344] We therefore adopt that approach.

246. In order to help assure that our methodology for adjusting capped rates when channels are added to, or deleted from, regulated tiers will help promote the growth and diversity of cable programming services, we will also permit operators a mark-up on new programming expense of 7.5%.[345] This mark-up will apply only to any additional

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[343] See para. 174-177, supra.

[344] We are not persuaded that other modifications to the third alternative offered by commenters are preferable. They are either inconsistent with our goal of maintaining reasonable rates, do not provide sufficient incentives for the growth and diversity of programming, and/or as proposed lack sufficient explanatory information or hard data to make an adequate assessment. Thus, Liberty's proposal suffers the same defects as option one regarding the potential for unreasonable rates since option one is a part of the Liberty proposal. Liberty Media Corp. Comments at 6-12 (Sept. 30, 1993). Cable Operators modification is also inconsistent with our goal of providing reasonable rates for subscribers, since it does not provide subscribers with the benefits of the efficiencies reflected in the benchmark curve. Cable Operators Comments at 7-8.

[345] The record does not provide extensive information on what would be an appropriate mark-up for programming expense. However, in our Cost Proceeding, we have identified 11.25% as a reasonable rate of return for an operator's investment in provision of regulated cable services. We believe that the mark-up on programming expense should be less than the rate of return on longer term investment in assets such as tangible plant in

programming cost for a tier,[346] measured on a per subscriber basis occurring after May 15, 1994. Operators must also reduce rates by any decreases in programming expense plus an additional 7.5% after that date. This will reduce incentives for operators to delete programming in order to replace it with new programming to which the mark-up could then be applied.[347]

247. Under these requirements, operators will first remove all external costs from the tier charge and then adjust the residual component of the tier charge by a specified amount per channel when the total number of regulated channels increases.[348] Should the total number of regulated channels decrease, the residual component of tier charge will be reduced by a specified amount. The per-channel adjustment factors used to calculate changes in permitted tier charges are derived from our benchmark equation and appear as a Table in the Technical Appendix.[349]

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service. On the other hand, in order to help assure the continued growth of programming services, we believe that the mark-up we established at the outset of our going-forward methodology should not be established at a minimal level. We thus choose 7.5% as a cautious choice for an initial permitted mark-up on programming expense. We will carefully monitor the impact of this permitted mark-up to assure that it is fair to cable operators and subscribers. We will revise it later if appropriate.

[346] Programming costs for purposes of external costs consist of any new or additional retransmission consent fees incurred after October 6, 1994 or compulsory copyright fees paid for carriage of distant broadcast signals.

[347] The valuation of programming costs for programming obtained from affiliated programmers will be governed by our affiliate transaction rules adopted in our Cost Proceeding.

[348] As explained in para. 174-175, supra, only the residual component of the tier charge is adjusted annually for inflation. This eliminates the need to compare changes in external costs to inflation.

[349] For example, if the average of the initial and final number of regulated channels is 46.5 or greater, then the per channel adjustment is $0.01. If the average is 7 (the lowest channel capacity in our sample survey), the per channel adjustment factor is $0.52. If the average is between 30 and 35.5 channels (this interval contains the mean value of total regulated channels for our sample), then the per channel adjustment is $0.03).

The Technical Appendix describes in some detail how they are computed.[350]

248. When a cable system changes the number of regulated channels offered, it must average the initial and final number of channels and find the adjustment factor in the table corresponding to that average. For any service tier, the total permitted adjustment is the product of the per channel adjustment factor and the change in the number of regulated channels on that tier. The adjustment is positive if the number of regulated channels has increased and negative if the total number of regulated channels has decreased. If a cable operator is merely restructuring tiers and there is no change in the total number of regulated channels, then the operator would find its total number of regulated channels in the table, note the corresponding per channel adjustment factor, and calculate adjustments in network costs per tier as explained earlier in this paragraph. After the residual component of the tier charge is adjusted in this fashion, all external costs, including programming expenses, will be combined with the adjusted residual to determine the final tier charge. As stated, any increased level of programming expense will be entitled to a 7.5 percent mark-up.

249. The foregoing methodology for adjusting capped rates when channels are added or deleted from a regulated tier is set forth in detail in our new rule section 76.922(e). FCC Form 1210 and associated instructions also sets forth in detail this methodology for adjusting capped

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[350] The basic methodology is to substitute mean values of our noncompetitive benchmark sample in the benchmark equation for all variables but the one that reflects total regulated channels. We then vary the magnitude of the total regulated channels variable to calculate the per channel adjustment factors. However, because low channel capacity systems are likely to have different characteristics than the average for the whole sample, we made a separate calculation for the seven to 20 channel region, using mean values for the subsample of noncompetitive systems with 20 or fewer channels instead of mean values for the entire noncompetitive sample. The noncompetitive sample exhibited channel capacities ranging from seven to 70. Because there are few systems in our sample with large channel capacities, we are less confident of the precision of our per channel network cost adjustment factors in the region above 50 or 60 channels. For this reason, we will explore further the issue of network cost adjustments in large capacity systems in the Further Notice of Proposed Rulemaking in this proceeding. This question is also discussed in more detail in the Technical Appendix.

rates when channels are added to, or deleted from, a regulated tier, as well as for external cost and inflation adjustments generally. This methodology will provide a relatively simple way for operators to determine rates when new programming services are added to regulated offerings. It will thus facilitate the provision of new programming services, and is not unduly burdensome on operators and regulators. It is also fully consistent with our revised benchmark approach to setting initial regulated rates and can be used for deletions of channels, and moving channels between regulated tiers. This approach also assures that channel additions or deletions on one tier do not affect rates on other tiers.

B. Upgrades Initiated Shortly Before Rate Regulation

1. Background

250. In the Third Further NPRM we sought comment on whether operators with rates below benchmark levels which initiated or completed system upgrades shortly before rate regulation should be permitted to raise rates to benchmark levels without any cost showing. We also solicited comments on alternatives to full cost-of-service showings that could permit recovery of such upgrade costs. In particular, we sought comment on whether the streamlined cost-of-service showing proposed in the Cost-of-Service NPRM should be applied to these situations.

2. Comments

251. Cable operators generally favored permitting operators that completed upgrades prior to regulation to raise their rates to the benchmark.[351] A number of commenters supported permitting operators to use streamlined cost-of-service showings.[352] One state commission, the Massachusetts Community Antenna Television Commission, questioned the extent to which rate increases are necessary to assure a reasonable return, since when systems are upgraded they may introduce at least some declining costs resulting from economies of scale as well as reduced maintenance costs. The state commission expressed concern

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[351] See, e.g., Viacom International, Inc. Comments at 15 (Sept. 30, 1993); TCI Comments at 3-4 (Sept. 30, 1993); NCTA Comments at 12-14 (Oct. 1, 1993); Cablevision Industries Corp., et. al. Comments at 14-16 (Sept. 30, 1993).

[352] See, e.g., Viacom International Inc. Comments at 13-15 (Sept. 30, 1993); Fidelity Reply Comments at 2-4.

regarding the possibility of a windfall, and pointed to cost-of-service proceedings as an option for systems that believe a reasonable return is denied by our other rate regulations.[353] A coalition of local franchising authorities opposed permitting systems which initiated upgrades shortly before rate regulation from raising rates to the benchmark level because doing so, they contend, gives preferential treatment to operators depending on when they made improvements. They argue that there is no evidence before the Commission that an adjustment is necessary, given the way the benchmarks were calculated.[354] GTE argued that these upgrades should not be granted external treatment because of the Commission's presumption that the initial rates cover system costs and that if rates are not adequate, the operator has the cost-of-service option.[355]

3. Discussion

252. Because we have decided on reconsideration to replace the benchmark system with a requirement that, with certain exceptions, all rates be reduced by the competitive differential to avoid refund liability, it is no longer necessary or appropriate to address the issue raised in the Third Further NPRM as to whether operators with rates below benchmark levels which initiated or completed system upgrades shortly before rate regulation should be permitted to raise rates to benchmark levels without any cost showing. Moreover, even if we had retained the original benchmark approach for determining initial regulated rates we would decide not to permit operators with rates below benchmark levels which initiated or completed system upgrades shortly before rate regulation to raise rates to the benchmark level without any cost showing. As discussed in the Rate Order, below-benchmark rates are presumptively not unreasonably low for cable operators because they were voluntarily established by operators in an unregulated environment.[356] Operators have not provided factual information that would alter the conclusion that rates voluntarily established by them as of the initial date of regulation will not be unreasonably low for them even if they have incurred upgrade

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[353] Massachusetts Community Antenna Television Commission Comments at 4-5 (Sept. 30, 1993).

[354] Austin, Texas, et. al. Comments at 4-8 (October 7, 1993); See, e.g., NATOA et. al. Reply Comments at 3, n. 5 (October 7, 1993).

[355] GTE Reply Comments at 12 (October 7, 1993).

[356] See Rate Order at para 232.

costs. In addition, absent a cost showing, local franchising authorities and the Commission would not be assured that the benchmark rate reflects a reasonable cost-based rate for recovery of the costs of the upgrade. Also, it has not been shown how we could adequately define past upgrades to determine eligibility for this treatment. Accordingly, we conclude that we shall not permit operators to raise rates above otherwise permitted levels on account of upgrades initiated or completed before regulation without any cost showings.

253. Providing for a streamlined cost-of-service showing for past upgrades would require an identification of past upgrade costs and evaluation of them in accordance with appropriate cost-of-service standards. We believe that this would be an unusually complex undertaking. In addition, as discussed herein, it has not been shown that below-benchmark rates established by operators are unreasonably low for them. Accordingly, we will additionally not establish special streamlined cost-of-service showings for past upgrades. Operators for whom our general rate regulations do not permit adequate recovery of upgrades initiated or completed shortly before rate regulation took effect may file cost-of-service showings.

IV. Fifth Notice of Proposed Rulemaking

A. Termination of Transition Relief

254. As discussed above,[357] we have determined that systems owned by small operators and systems with low prices will not have to apply the full 17 percent competitive differential pending our analysis of the relationship between costs and prices for those systems. We are initiating these cost studies in our Cost Proceeding. Accordingly, we are here providing notice that we will establish further requirements concerning permitted rates for systems currently eligible for transition treatment. As stated, depending on the results of our cost studies, these further provisions could require such systems to terminate transition relief and establish full reduction rates.

B. Going-Forward Methodology

255. Cable operators are actively exploring new technical developments that may enable them to provide up to 500 channels. Some of these technical capabilities may involve significant modifications or additions to distribution plant. Others may involve compression and

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[357] See supra, para. 127.

multiplexing techniques that permit derivation of many channels without significant new distribution plant. The benchmark table adopted in the Rate Order, and our table reflecting the efficiency curve observed in our Competitive Survey, establish per channel adjustments for systems with total channels on regulated tiers of 100 channels or less. It does not currently establish per channel rates for systems that provide more than 100 channels.

256. We solicit comment on whether we should establish a methodology for adjusting capped rates in situations where there are more than 100 regulated channels. We solicit comment generally on what that methodology should be. We also seek comment on whether we could use mathematical formulations derived from existing data or tables. We also solicit comment on whether, instead of adopting a methodology for setting rates for offerings of more than 100 channels, we should cap rates at the 100 channel level unless the operator could justify a higher rate based on a cost-of-service showing. We solicit comments on how any of these proposals would effect incentives for operators to provide additional channels on an "a la carte" basis. We additionally solicit comment on whether our going-forward methodology should be modified to provide greater or lesser compensation to operators for adjustments to capped rates when channels are added or deleted from regulated tiers, and whether this would better meet our goals of encouraging infrastructure development and growth of programming. Operators should provide a complete factual justification for any claims that the current methodology is inadequate.

C. Commercial Rates

257. We have determined that we would not establish rules permitting special rates for regulated commercial cable service on reconsideration of the Rate Order. We stated, however, that allowances for commercial rates might help assure that rates for subscribers are reasonable if higher commercial earnings were offset by savings to consumers. Therefore, we solicit comment on whether we should establish regulations governing rates for regulated cable service provided to commercial establishments. In particular, we ask whether higher earnings for commercial establishments should be offset by lower rates to other subscribers. We solicit comment on whether the offset in rates to other subscribers should be exactly equal to the additional earnings from higher commercial rates. Alternatively, we could establish regulations that would mandate a specified level of sharing of earnings from higher commercial rates between operators and subscribers. We solicit comment on which approach would best serve

subscribers and operators. We also solicit comment on what standards of reasonableness we could establish to govern commercial rates.

V. Regulatory Flexibility Act Analysis

A. Final Analysis for the Fourth Report and Order and Second Order on Reconsideration.

258. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, the Commission's final analysis with respect to the Fourth Report and Order and Second Order on Reconsideration is as follows:

259. Need and purpose of this action. The Commission, in compliance with § 3 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 543 (1992) pertaining to rate regulation, adopts revised rules and procedures intended to ensure cable subscribers of reasonable rates for cable services with minimum regulatory and administrative burden on cable entities.

260. Summary of issues raised by the public in response to the Initial Regulatory Flexibility Analysis. There were no comments submitted in response to the Initial Regulatory Flexibility Analysis. The Chief Counsel for Advocacy of the United States Small Business Administration (SBA) filed comments in the original rulemaking order. The Commission addressed the concerns raised by the Office of Advocacy in the Rate Order.[358]

261. Significant alternatives considered and rejected. Petitioners representing cable interests and franchising authorities submitted several alternatives aimed at minimizing administrative burdens. In the present Order on Reconsideration, the Commission has attempted to accommodate the concerns addressed by these suggestions. For example, the Commission has chosen a more sophisticated economic model from among a number of statistical options to recalculate the competitive differential, and has reconsidered the benchmark approach such that all regulated cable systems will be required to establish rates based on the revised competitive differential. However, the Commission has determined that certain systems will not have to reduce rates by the full competitive differential immediately. Rather, the Commission will conduct cost studies of cable operators to allow systems with relatively low rates and operators with 15,000 or fewer subscribers to present evidence that the new competitive differential

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[358] See Rate Order at paras. 566-572.

should not apply in full to them. These decisions will better ensure that regulated cable service rates are reasonable while reducing administrative burdens. In addition, the Commission provides administrative relief in the rate-setting process, and adopts simplified procedures concerning the requirements for calculating equipment costs and revenues for cable systems of 1,000 or fewer subscribers.

262. The Third Further NPRM in this proceeding presented three alternative methodologies for the adjustment of capped rates when channels are added or deleted from regulated service tiers. Many commenters supported, with some suggesting modifications, the approach the Commission tentatively endorsed in the Third Further NPRM. The Commission considered alternative methodologies and found on the basis of the record that the "parallel track" approach adopted in this Order, as well as the variety of revisions to its rate rules adopted here, will best achieve the goals of ensuring reasonable rates for consumers, promoting the growth and diversity of cable programming services, and facilitating ease of administration.

B. Initial Regulatory Flexibility Analysis for the Fifth Notice of Proposed Rulemaking.

263. Pursuant to Section 603 of the Regulatory Flexibility Act, the Commission has prepared the following initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the Notice, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981).

264. Reason for action. The Cable Television Consumer Protection and Competition Act of 1992 requires the Commission to prescribe rules and regulations for determining reasonable rates for basic tier cable service and to establish criteria for identifying unreasonable rates for cable programming services. The Commission has adopted rate regulations that require a comparison to the rates of cable systems subject to effective competition, as defined in the Cable Act of 1992 and represented in the revised benchmark formula. This Notice proposes to establish

regulations governing the setting of rates for regulated cable systems with more than 100 channels, and to consider separate rate regulations for commercial entities and rules for termination of transition relief.

265. Objectives. To propose rules to implement Section 3 of the Cable Television Consumer Protection and Competition Act of 1992. We also desire to adopt rules that will be easily interpreted and readily applicable and, whenever possible, minimize the regulatory burden on affected parties.

266. Legal Basis. Action as proposed for this rulemaking is contained in Sections 4(i), 4(j), 303(r) and 623 of the Communications Act of 1934, as amended.

267. Description, potential impact and number of small entities affected. We anticipate a possible impact on small entities because the Notice addresses the termination of transition relief for small systems owned by small operators. The Cable Act of 1992 defines a small system as serving 1,000 or fewer subscribers.

268. Reporting, record keeping and other compliance requirements. None.

269. Federal rules which overlap, duplicate or conflict with this rule. None.

270. Any significant alternatives minimizing impact on small entities and consistent with stated objectives. None.

VI. Paperwork Reduction Act

271. The requirements adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

VII. Procedural Provisions

272. Ex parte Rules - Non-Restricted Proceeding. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in Commission rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

273. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47

C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before 45 days after publication in the Federal Register and reply comments on or before 75 days after publication in the Federal Register. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments and reply comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street N.W., Washington D.C. 20554.

VIII. Ordering Clauses

274. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303 (r), 612, 622(c) and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 532, 542(c) and 543 the rules, requirements and policies discussed in this Second Order on Reconsideration and Fourth Report and Order, ARE ADOPTED and Part 76 of the Commission's rules, 47 C.F.R. Part 76, IS AMENDED as set forth in Appendix A.

275. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), 612(c), 622(c) and 623 of the Communications Act of 1934, 47 U.S.C. §§ 154 (i), 154 (j), 303(r), 532 (c), 542(c), and 543, NOTICE IS HEREBY GIVEN of proposed amendments to Part 76, in accordance with the proposals, discussions, and statement of issues in this Notice of Proposed Rulemaking, and that COMMENT IS SOUGHT regarding such proposals, discussion, and statement of issues.

276. IT IS FURTHER ORDERED that, the Secretary shall send a copy of this Report and Order, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 et seq. (1981).

277. IT IS FURTHER ORDERED that, the requirements and regulations established in this decision shall become effective May 15, 1994 with the exception of the 30 day

notice requirement for rate changes[359] to be codified at 47 C.F.R. Section 76.964 which shall be effective upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[359] As discussed above, we find good cause for making this notice provision effective on less than 30 days notice in the Federal Register. See supra para. 142 and note 189; see also 5 U.S.C. Section 533(d)(3).

APPENDIX A -- LIST OF COMMENTING PARTIES/PETITIONERS

APPENDIX A

MM Docket No. 92-266

Petitions for Reconsideration of Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266, 8 FCC Rcd 5631 (1993)

Affiliated Regional Communications, Ltd.
Alaska Cablevision, Inc.
Alsea River Cable TV
Arizona Cable Television Association, et. al.
Atlanta Interfaith Broadcasters, Inc.
Bank of New York
Baraff, Koerner, Olender & Hochberg, P.C.
Bell Atlantic
Black Entertainment Television, Inc.
Blade Communications, Inc.
Booth American Company, et al.
C-SPAN
Cable Services
Cablevision Systems Corporation
California Cable Television Association
Center for Media Education, et al.
Century Communications Corp.
Coalition of Small System Operators
Colony Communications, Inc., et al.
Comcast Cable Communications, Inc.
Community Antenna Television Association, Inc.
Community Broadcasters Association
Continental Cablevision, Inc.
Corning Incorporated; Scientific Atlanta, Inc.
Crown Media, Inc.
Discovery Communications, Inc.
The Disney Channel
E! Entertainment Television, Inc.
Encore Media Corporation
Fairmont Cable
Harron Communications Corp.
Higgins Lake Cable, Inc.
Inland Bay Cable TV Associates
InterMedia Partners
King County, Wash., et al.
Liberty Media Corp.
Longview Cable Television
Michigan C-TEC Communities
Mountain Cablevision, Inc.
Multichannel Communication Sciences, Inc.
Municipal Franchising Authorities

National Association of Telecommunications Officers and Advisors, et al.
National Cable Television Association, Inc.
Newhouse Broadcasting Corporation
Northland Communications Corp.
Paradise Television Network, Inc.
Searle, Stanley M.
SuperStar Connection
Sur Corporation
Tele-Communications, Inc.
Time Warner Entertainment Company, L.P.
TKR Cable Company/TKR Cable of Kentucky
Turner Broadcasting System, Inc.
Valuevision International, Inc.
Viacom International, Inc.
Video Data Systems
Video Jukebox Network, Inc.
Wometco Cable Corp.

Comments/Oppositions to Petitions for Reconsideration

Ad Hoc Rural Consortium
Advanced Communications, Inc.
Affiliated Regional Communications, Ltd.
Arizona Cable Television Association
Bell Atlantic
BellSouth Telecommunications
Bend Cable Communications, Inc., et al.
Cable TV of Jersey City, Inc.
Cablevision Industries Corporation, et al.
Cablevision Systems Corporation
Center for Media Education, et al.
Consumer Electronics Group of the Electronic Industries Association
Consumer Federation of America
C-TEC Cable Systems
Continental Cablevision, Inc.
General Instrument Corporation
GTE Service Corporation
Home Recording Right Coalition
Home Shopping Network, Inc.
King County, et al.
Liberty Cable Company, Inc.
Medium-Sized Operators Group
Michigan Communities
National Association of Telecommunications Officers and Advisors, et al.
National Association of Towns and Townships
National Cable Television Association, Inc.
National Telephone Cooperative Association
Prevue Networks, Inc.
Time Warner Entertainment Company, Inc.

United States Telephone Association
USA Networks
Valuevision International, Inc.
Viacom International, Inc.
Videomaker Magazine

Replies to Oppositions to Petitions for Reconsideration

Cablevision Industries Corp., et al.
Cablevision Systems Corporation
Center for Media Education, et al.
City of Saint Paul
Coalition of Small System Operators
Continental Cablevision, Inc.
Corning Incorporated; Scientific-Atlanta, Inc.
Discovery Communications, Inc.
Engle Broadcasting
King County, Wash., et al.
Liberty Media Corporation
Medium-Sized Operators Group
Michigan C-TEC Corporation
National Association of Telecommunications Officers and Advisors, et al.
National Cable Television Association, Inc.
Paradise Television Network, Inc.
Puerto Rico Cable Television Association
State of Hawaii
Sur Corporation
Televista Communications, Inc.
Time Warner Entertainment Company, L.P.
United Video, Inc.
Valuevision International, Inc.
Viacom International, Inc.

Comments to Further Notice of Proposed Rulemaking in MM Docket No. 92-266, 8 FCC Rcd 5631 (1993)

Alsea River Cable TV
Arizona Cable Television Association, et al.
Bell Atlantic
Black Rock Cable TV
Bonduel Cable TV, et al.
Bye Cable, Inc.
Cable Services
Cableview
Cablevision Industries Corporation, et al.
Cascade Cable Systems
City of Alexandria, VA
Coalition of Small System Operators
Colony Communications, Inc., et al.
Community Antenna Television Association, Inc.
Consumer Federation of America

Continental Cablevision, Inc.
Counsel to the Municipal Franchising Authorities
Country Cablevision, Inc.
Discovery Communications, Inc.
Green River Cable TV
Massachusetts Community Antenna Television Commission
National Cable Television Association, Inc.
National Association of Telecommunications Officers and Advisors, et al.
Pacific Coast Cable Co.
Stephen Cable TV, Inc.
Tele-Communications, Inc.
Time Warner Entertainment Company, L.P.
Unites States Telephone Association
Viacom International, Inc.

Reply Comments to Further Notice of Proposed Rulemaking in MM Docket No. 92-266, 8 FCC Rcd 5631 (1993)

Bell Atlantic
Cablevision Industries Corporation, et al.
Coalition of Small System Operators
Consumer Federation of America
Continental Cablevision, Inc.
Maryland People's Counsel
Mets Fans United
Municipal Franchising Authorities
State of New Jersey, Department of the Public Advocate
Time Warner Entertainment Company, L.P.
United Homeowners Association

Comments to [Second] Further Notice of Proposed Rulemaking in MM Docket No. 92-266, 8 FCC Rcd 5585 (1993).

Adelphia Communications
Bend Cable Communications, Inc., et al.
Coalition of Small System Operators
Community Antenna Television Association
Dennis Ready
Falcon Cable Group
GTE Service Corporation
Medium-Sized Operators Group
Mullin, Rhyne, Emmons and Topel, P.C.
National Cable Television Association, Inc.
National Association of Telecommunications Officers and Advisors, et al.
National Telephone Cooperative Association
Siskiyou Cablevision, Inc.
Small Cable Business Association
Tele-Media Corporation
Union Telephone, Inc.
Valley TV Cooperative, Inc.

Wyoming Association of Municipalities

Reply Comments to [Second] Further Notice of Proposed Rulemaking in MM Docket No. 92-266, 8 FCC Rcd 5585 (1993).

Bell Atlantic
Bend Cable Communications, Inc., et al.
Coalition of Small System Operators
GTE Service Corp.

Petition for Reconsideration of First Order on Reconsideration, Second Report and Order and Third [Further] Notice of Proposed Rulemaking in MM Docket No. 92-266, 58 FR 46718 (September 2, 1993).

New York Telephone Company and New England Telephone and Telegraph Company ("NYNEX")
Attorney General of the State of Connecticut (Statement in support of NYNEX)

Oppositions to Petitions for Reconsideration

Cablevision Industries Corporation, et al.
Continental Cablevision, Inc.
Time Warner Entertainment Company, L.P.
Viacom International, Inc.

Reply to Oppositions to Petitions for Reconsideration

NYNEX

Comments to Third [Further] Notice of Proposed Rulemaking in MM Docket No. 92-266, 58 FR 46718 (September 2, 1993).

Adelphia Communications
Affiliated Regional Communications, Ltd.
Austin, Texas, et al.
Cable Television Association of New York, Inc.
Cablevision Industries Corporation, et al.
Cablevision Systems Corporation
Community Antenna Television Association
Continental Cablevision, Inc.
Discovery Communications, Inc.
et al.
Falcon Cable TV, et al.
GTE Service Corp.
Hearst Corporation
KBLCom, et al.
Liberty Media Corporation
Massachusetts Cable TV
Media General Cable
Municipal Franchising Authorities

National Cable Television Association, Inc.
National Association of Telecommunications Officers and Advisors, National Broadcasting Company
New Jersey Board of Regulatory Authorities
New York State Commission on Cable Television
Newhouse Broadcasting Corporation
Summitt Communications
Tele-Communications, Inc.
Tele-Media Corporation
The Disney Channel
Time Warner Entertainment Company, L.P.
TKR Cable Company/TKR Cable of Kentucky
Viacom International, Inc.

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E! Entertainment Television, Inc.
Fidelity Cablevision, Inc.
GTE Service Corp.
KBLCom, Inc., et al.
Liberty Media Corporation
Media General Cable
National Cable Television Association, Inc.
National Association of Telecommunications Officers and Advisors, et al.
Time Warner Entertainment Company, L.P.
Viacom International, Inc.

APPENDIX B -- RULES

APPENDIX B

Title 47, Part 76 of the Code of Federal Regulations is amended as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat. as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 535, 542, 543, 552 as amended, 106 Stat. 1460.

2. Section 76.901 is amended to revise paragraph (c) to read as follows:

Section 76.901 Definitions

* * * * *

(c) Small System. A small system is a cable television system that serves 1,000 or fewer subscribers. The service area of a small system shall be determined by the number of subscribers that are served by the system's principal headend, including any other headends or microwave receive sites that are technically integrated to the principal headend.

3. Section 76.922 is amended to revise paragraphs (b), (c) and (d), and to add new paragraphs (e) and (f) to read as follows:

Section 76.922 Rates for the basic service tier and cable programming services tiers.

* * * * *

(b) Permitted charge on May 15, 1994

(1) The permitted charge for a tier of regulated program service shall be, at the election of the cable system, either: (i) a rate determined pursuant to a cost-of-service showing; (ii) the full reduction rate; (iii) the transition rate, if the system is eligible for transition relief; or (iv) a rate based on a streamlined rate reduction, if the system is eligible to implement such a rate reduction. Except where noted, the term "rate" in this subsection means a rate measured on an average regulated

revenue per subscriber basis.

(2) Full reduction rate. The "full reduction rate" on May 15, 1994 is the system's September 30, 1992 rate, measured on an average regulated revenue per subscriber basis, reduced by 17 percent, and then adjusted for the following: (i) the establishment of permitted equipment rates as required by Section 76.923; (ii) inflation measured by the GNP-PI between October 1, 1992 and September 30, 1993; (iii) changes in the number of program channels subject to regulation that are offered on the system's program tiers between September 30, 1992 and the earlier of the initial date of regulation for any tier or February 28, 1994; and (iv) changes in external costs that have occurred between the earlier of the initial date of regulation for any tier or February 28, 1994, and March 31, 1994.

(3) March 31, 1994 benchmark rate. The "March 31, 1994 benchmark rate" is the rate so designated using the calculations in Form 1200.

(4) Transition rates. Systems owned by small operators and systems with low prices shall be eligible to establish a transition rate for a tier, pending a further order of the Commission.

(A) Systems owned by small operators

(i) For purposes of determining eligibility to establish a transition rate, a system owned by a small operator is a system owned by an operator that has a total subscriber base of 15,000 or fewer subscribers as of March 31, 1994. Systems owned by cable operators with between 15,000 and 16,000 subscribers may, upon a showing of substantial hardship, obtain a waiver from the Commission of the foregoing 15,000 subscriber limit.

(ii) A system owned by a small operator shall not be eligible to establish a transition rate if the operator is owned or controlled by, or is under common control or affiliated with, a cable operator serving more than 15,000 subscribers. For purposes of this rule, a small cable operator will be considered affiliated with an operator serving more than 15,000 subscribers if such an operator holds a 20 percent or greater equity interest in the small operator.

(iii) The transition rate for systems owned by small operators on May 15, 1994 shall be the system's March 31, 1994 rate, adjusted: (1) to establish permitted rates for equipment as required by Section 76.923 if such equipment rates have not already been established; and (2)

for changes in external costs incurred between the earlier of the initial date of regulation for any tier or February 28, 1994, and March 31, 1994, to the extent such external cost changes are not already reflected in the system's March 31, 1994 rate.

(B) Low-price systems

(i) A low-price system is a system (1) whose March 31, 1994 rate is below its March 31, 1994 benchmark rate, or (2) whose March 31, 1994 rate is above its March 31, 1994 benchmark rate, but whose March 31, 1994 full reduction rate is below its March 31, 1994 benchmark rate, as defined in Section 76.922(b)(2), above.

(ii) The transition rate on May 15, 1994 for a system whose March 31, 1994 rate is below its March 31, 1994 benchmark rate is the system's March 31, 1994 rate. The March 31, 1994 rate is in both cases adjusted: (1) to establish permitted rates for equipment as required by Section 76.923 if such rates have not already been established; and (2) for changes in external costs incurred between the earlier of initial date of regulation of any tier or February 28, 1994, and March 31, 1994, to the extent changes in such costs are not already reflected in the system's March 31, 1994 rate. The transition rate on May 15, 1994 for a system whose March 31, 1994 adjusted rate is above its March 31, 1994 benchmark rate, but whose March 31, 1994 full reduction rate is below its March 31, 1994 benchmark rate, is the March 31, 1994 benchmark rate, adjusted to establish permitted rates for equipment as required by Section 76.923 if such rates have not already been established.

(C) Notwithstanding the foregoing, the transition rate for a tier shall be adjusted to reflect any determination by a local franchising authority and/or the Commission that the rate in effect on March 31, 1994 was higher (or lower) than that permitted under applicable Commission regulations. A filing reflecting the adjusted rate shall be submitted to all relevant authorities within 30 days after issuance of the local franchising authority and/or Commission determination. A system whose March 31, 1994 rate is determined by a local franchising authority or the Commission to be too high under the Commission's rate regulations in effect before May 15, 1994 will be subject to any refund liability that may accrue under those rules. In addition, the system will be liable for refund liability under the rules in effect on and after May 15, 1994. Such refund liability will be measured by the difference in the system's March 31, 1994 rate and its permitted March 31, 1994 rate as calculated under the Commission's rate

regulations in effect before May 15, 1994. The refund liability will accrue according to the time periods set forth in Sections 76.942, and 76.961 of the Commission's rules.

(5) Streamlined rate reductions.

(A) Small systems that are not owned by or affiliated with any other system ("independent systems"), and small systems owned by small multiple system operators ("small MSOs"), that have not already restructured their rates to comply with the Commission's rules may establish rates for regulated program services and equipment by making a streamlined rate reduction. "Small MSOs" are those multiple system operators that (i) serve 250,000 or fewer total subscribers, (ii) own only systems with less than 10,000 subscribers each, and (iii) have an average system size of 1,000 or fewer subscribers. Independent small systems and small systems owned by small MSOs shall not be eligible for streamlined rate reductions if they are owned or controlled by, or are under common control or affiliated with, a cable operator that exceeds these subscriber limits. For purposes of this rule, a small system will be considered "affiliated with" such an operator if the operator holds a 20 percent or greater equity interest in the small system.

(B) The streamlined rate for a tier on May 15, 1994 shall be the system's March 31, 1994 rate for the tier, reduced by 14 percent. A small system that elects to establish its rate for a tier by implementing this streamlined rate reduction must also reduce, at the same time, each billed item of regulated cable service, including equipment, by 14 percent. Regulated rates established using the streamlined rate reduction process shall remain in effect until: (1) adoption of a further order by the Commission establishing a schedule of average equipment costs; (2) the system increases its rates using the calculations and time periods set forth in FCC Form 1211; or (3) the system elects to establish permitted rates under another available option set forth in paragraph (b)(1) of this Section.

(C) Implementation and notification. An eligible small system that elects to use the streamlined rate reduction process must implement the required rate reductions and provide written notice of such reductions to subscribers, the local franchising authority and the Commission according to the following schedule:

(i) Where the franchising authority has been certified by the Commission to regulate the small system's basic service tier rates as of May 15, 1994, the system must

notify the franchising authority and its subscribers in writing that it is electing to set its regulated rates by the streamlined rate reduction process. Such notice must be given by June 15, 1994, and must also describe the new rates that will result from the streamlined rate reduction process. Those rates must then be implemented within 30 days after the written notification has been provided to subscribers and the local franchising authority.

(ii) Where the franchising authority has not been certified to regulate basic service tier rates by May 15, 1994, the small system must provide the written notice to subscribers and the franchising authority, described in subsection (i) above, within 30 days from the date it receives the initial notice of regulation from the franchising authority. The system must then implement the streamlined rate reductions within 30 days after the written notification has been provided to subscribers and the local franchise authority.

(iii) Where the Commission is regulating the small system's basic service tier rates as of May 15, 1994, the system must notify the Commission and its subscribers in writing that it is electing to set its regulated rates by the streamlined rate reduction process. Such notice must be given by June 15, 1994, and must also describe the new rates that will result from the streamlined rate reduction process. Those rates must then be implemented within 30 days after the written notification has been provided to subscribers and the Commission.

(iv) Where the Commission begins regulating basic service rates after May 15, 1994, the small system must provide the written notice to subscribers and the Commission, described in paragraph (iii) above, within 30 days from the date it receives an initial notice of regulation. The system must then implement the streamlined rate reductions within 30 days after the written notification has been provided to subscribers and the Commission.

(v) If a complaint about its cable programming service rates has been filed with the Commission on or before May 15, 1994, the small system must provide the written notice described in paragraph (i), above, to subscribers, the local franchising authority and the Commission by June 15, 1994. If a cable programming services complaint is filed against the system after May 15, 1994, the system must provide the required written notice to subscribers, the local franchising authority or the Commission within 30 days after the complaint is filed. The

system must then implement the streamlined rate reductions within 30 days after the written notification has been provided.

(vi) A small system is required to give written notice of, and to implement, the rates that are produced by the streamlined rate reduction process only once. If a system has already provided notice of, and implemented, the streamlined rate reductions when a given tier becomes subject to regulation, it must report to the relevant regulator (either the franchising authority or the Commission) in writing within 30 days of becoming subject to regulation that it has already provided the required notice and implemented the required rate reductions.

(6) Establishment of initial regulated rates.

(A) Cable systems, other than those eligible for streamlined rate reductions, shall file FCC Forms 1200, 1205, and 1215 for a tier that is regulated on May 15, 1994 by June 15, 1994, or thirty days after the initial date of regulation for the tier. A system that becomes subject to regulation for the first time on or after July 1, 1994 shall also file FCC Form 1210 at the time it files FCC Forms 1200, 1205 and 1215.

(B) A cable system will not incur refund liability under the Commission's rules governing regulated cable rates on and after May 15, 1994 if: (1) between March 31, 1994 and July 14, 1994, the system does not change the rate for, or restructure in any fashion, any program service or equipment offering that is subject to regulation under the 1992 Cable Act; and (2) the system establishes a permitted rate defined in paragraph (b) of this rule by July 14, 1994. The deferral of refund liability permitted by this subsection will terminate if, after March 31, 1994, the system changes any rate for, or restructures, any program service or equipment offering subject to regulation, and in all events will expire on July 14, 1994. Moreover, the deferral of refund liability permitted by this subsection does not apply to refund liability that occurs because the system's March 31, 1994 rates for program services and equipment subject to regulation are higher than the levels permitted under the Commission's rules in effect before May 15, 1994.

(7) For purposes of this section, the initial date of regulation for the basic service tier shall be the date on which notice is given pursuant to § 76.910 of our rules, that the provision of the basic service tier is subject to regulation. For a cable programming services tier, the initial date of regulation shall be the first date

on which a complaint on the appropriate form is filed with the Commission concerning rates charged for the cable programming services tier.

(8) For purposes of this section, rates in effect on the initial date of regulation or on September 30, 1992 shall be the rates charged to subscribers for service received on that date.

(c) Subsequent permitted charge. The permitted charge for a tier after May 15, 1994 shall be, at the election of the cable system, either (1) a rate determined pursuant to a cost-of-service showing, or (2) a rate determined by application of the Commission's price cap requirements set forth in paragraph (d) below to a permitted rate determined in accordance with paragraph (b) above.

(d) Price cap requirements. The Commission's price cap requirements allow a system to adjust its permitted charges for inflation and changes in external costs. After May 15, 1994, adjustments for changes in external costs shall be calculated by subtracting external costs from the system's permitted charge and making changes to that "external cost component" as necessary. The remaining charge, referred to as the "residual component," will be adjusted annually for inflation. Cable systems shall use FCC Form 1210 (or FCC Form 1211, where applicable) to justify changes in permitted rates made pursuant to the price cap requirements.

(1) Calendar year quarters. All systems must use a calendar year quarter when adjusting rates under the price cap requirements. The first quarter shall run from January 1 through March 31 of the relevant year; the second quarter shall run from April 1 through June 30; the third quarter shall run from July 1 through September 30; and the fourth quarter shall run from October 1 through December 31.

(2) Inflation adjustments. The residual component of a system's permitted charge may be adjusted annually for inflation. The annual inflation adjustment shall be based on inflation occurring from June 30 of the previous year to June 30 of the year in which the inflation adjustment is made, except that the first annual inflation adjustment shall cover inflation from September 30, 1993 until June 30 of the year in which the inflation adjustment is made. The adjustment may be made after September 30, but no later than August 31 of the next calendar year. Adjustments shall be based on changes in the Gross National Product Price Index as published by the Bureau of Economic Analysis of the United States Department of Commerce. Cable systems that

establish a transition rate pursuant to paragraph (b)(4) above shall not be permitted to adjust rates on account of inflation until the transition rate adjusted for external costs and changes in numbers of regulated channels is less than, or equal to, the system's full reduction rate adjusted for inflation, external costs and changes in numbers of regulated channels.

(3) External costs.

(i) Permitted charges for a tier may be adjusted up to quarterly to reflect changes in external costs experienced by the cable system. In all events, a system must adjust its rates annually to reflect any decreases in external costs that have not previously been accounted for in the system's rates. A system must also adjust its rates annually to reflect any changes in external costs, inflation and the number of channels on regulated tiers that occurred during the year if the system wishes to have such changes reflected in its regulated rates. A system that does not adjust its permitted rates annually to account for these changes will not be permitted to increase its rates subsequently to reflect the changes.

(ii) A system must adjust its rates in the next calendar year quarter for any decrease in programming costs that results from the deletion of a channel or channels from a regulated tier.

(iii) Any rate increase made to reflect an increase in external costs must also fully account for all other changes in external costs, inflation and the number of channels on regulated tiers that occurred during the same period. Rate adjustments made to reflect changes in external costs shall be based on any changes in those external costs that occurred from the end of the last quarter for which an adjustment was previously made through the end of the quarter that has most recently closed preceding the filing of the FCC Form 1210 (or FCC Form 1211, where applicable). A system may adjust its rates after the close of a quarter to reflect changes in external costs that occurred during that quarter as soon as it has sufficient information to calculate the rate change.

(iv) External costs shall consist of costs in the following categories: (1) state and local taxes applicable to the provision of cable television service; (2) franchise fees; (3) costs of complying with franchise requirements, including costs of providing public, educational, and governmental access channels as required by the franchising authority; (4) retransmission consent fees and copyright fees incurred for the carriage of broadcast

signals; and (5) other programming costs.

(v) The permitted charge for a regulated tier shall be adjusted on account of programming costs, copyright fees and retransmission consent fees only for the program channels or broadcast signals offered on that tier.

(vi) The permitted charge shall not be adjusted for costs of retransmission consent fees or changes in those fees incurred prior to October 6, 1994.

(vii) The starting date for adjustments on account of external costs for a tier of regulated programming service shall be the earlier of the initial date of regulation for any basic or cable service tier or February 28, 1994.

(viii) Changes in franchise fees shall not result in an adjustment to permitted charges, but rather shall be calculated separately as part of the maximum monthly charge per subscriber for a tier of regulated programming service.

(ix) Adjustments to permitted charges to reflect changes in the costs of programming purchased from affiliated programmers, as defined in Section 76.901 of these rules, shall be permitted as long as the price charged to the affiliated system reflects either prevailing company prices offered in the marketplace to third parties (where the affiliated program supplier has established such prices) or the fair market value of the programming.

(x) Adjustments to permitted charges on account of increases in costs of programming shall be further adjusted to reflect any revenues received by the operator from the programmer.

(xi) In calculating programming expense, operators may add add a mark-up of 7.5% for new programming added after May 15, 1994 and shall reduce rates by decreases in programming expense plus an additional 7.5% for decreases occurring after May 15, 1994.

(e) Changes in the number of channels on regulated tiers. A system may adjust the residual component of its permitted rate for a tier to reflect changes in the number of channels offered on the tier on a quarterly basis. Cable systems shall use FCC Form 1210 (or FCC Form 1211, where applicable) to justify rate changes made on account on changes in the number of channels on a regulated tier. Such rate adjustments shall be based on any changes in the number of regulated channels that occurred from the end of the last

quarter for which an adjustment was previously made through the end of the quarter that has most recently closed preceding the filing of the FCC Form 1210 (or FCC Form 1211, where applicable). However, when it deletes channels in a calendar quarter, a system must adjust the residual component of the tier charge in the next calendar quarter to reflect that deletion. The following table shall be used to adjust permitted rates for a tier for changes in the number of channels offered on the tier. The entries in the table provide the cents per channel per subscriber per month by which cable operators will adjust the residual component using FCC Form 1210 (or FCC Form 1211, where applicable).

Average Number of Regulated Channels	Per-Channel Adjustment Factor	Average Number of Regulated Channels	Per-Channel Adjustment Factor
7	$0.52	14	0.14
7.5	0.45	14.5	0.13
8	0.40	15-15.5	0.12
8.5	0.36	16	0.11
9	0.33	16.5-17	0.10
9.5	0.29	17.5-18	0.09
10	0.27	18.5-19	0.08
10.5	0.24	19.5-21.5	0.07
11	0.22	22-23.5	0.06
11.5	0.20	24-26	0.05
12	0.19	26.5-29.5	0.04
12.5	0.17	30-35.5	0.03
13	0.16	36-46	0.02
13.5	0.15	46.5 and above	0.01

In order to adjust the residual component of the tier charge when there is a change in the number of channels on a tier, the operator shall perform the following calculations: (1) take the sum of the old total number of channels on tiers subject to regulation (i.e., tiers that are, or could be, regulated) and the new total number of channels and divide the resulting number by two; (2) consult the above table to find the applicable per channel adjustment factor

for the number of channels produced by the calculations in step (1). For each tier for which there has been a change in the number of channels multiply the per-channel adjustment factor times the change in the number of channels on that tier. The result is the total adjustment for that tier. It is positive if the number of channels on the tier has increased and negative if the number of channels has decreased.

(f) Permitted charges for a tier shall be determined in accordance with forms and associated instructions established by the Commission.

4. Section 76.923 is amended to add paragraph (l) to read as follows:

Section 76.923 Rates for equipment and installation used to receive the basic service tier

* * * * *

(l) Company-wide averaging of equipment costs. For the purpose of developing unbundled equipment charges as required by Section 76.923(b), a cable operator may average the equipment costs of its small systems at any level, or several levels, within its operations. This company-wide averaging applies only to an operator's small systems as defined in Section 76.901(c) above; is permitted only for equipment charges, not installation charges; and may be established only for similar types of equipment. When submitting its equipment costs based on average charges to the local franchising authority or the Commission, an operator that elects company-wide averaging of equipment costs must provide a general description of the averaging methodology employed and a justification that its averaging methodology produces reasonable equipment rates. The local authority or the Commission may require the operator to set equipment rates based on the operator's level of averaging in effect on April 3, 1993, as required by Section 76.924(d).

5. Section 76.934 is amended to redesignate current Section 76.934 as paragraph (a) and to add new paragraphs (b) and (c).

Section 76.934 Small Systems

(a) A franchising authority that has been certified, pursuant to § 76.910, to regulate rates for basic service and associated equipment may permit a small system as defined in § 76.901 to certify that the small system's rates for basic service and associated equipment comply with

§ 76.922, the Commission's substantive rate regulations.

(b) Initial regulation of small systems

(1) If certified by the Commission, a local franchising authority may provide an initial notice of regulation to a small system, as defined by Section 76.901(c), on May 15, 1994. Any initial notice of regulation issued by a certified local franchising authority prior to May 15, 1994 shall be considered as having been issued on May 15, 1994.

(2) The Commission will accept complaints concerning the rates for cable programming service tiers provided by small systems on or after May 15, 1994. Any complaints filed with the Commission about the rates for a cable programming service tier provided by a small system prior to May 15, 1994 shall be considered as having been filed on May 15, 1994.

(3) A small system that receives an initial notice of regulation from its local franchising authority, or a complaint filed with the Commission for its cable programming service tier, must respond within the time periods prescribed in Sections 76.930 and 76.956.

(c) Statutory period for filing initial complaint. A complaint concerning a rate for cable programming service or associated equipment provided by a small system that was in effect on May 15, 1994 must be filed within 180 days from May 15, 1994.

(d) Petitions for extension of time. Small systems may obtain an extension of time to establish compliance with rate regulations provided they can demonstrate that timely compliance would result in severe economic hardship. Requests for extension of time should be addressed to the local franchising authority concerning basic service and equipment rates and to the Commission concerning rates for a cable programming service tier and associated equipment. The filing of a request for an extension of time to comply with the rate regulations will not toll the effective date of rate regulation for small systems or alter refund liability for rates that exceed permitted levels after May 15, 1994.

6. Section 76.952(a) is amended to revise paragraph (a) to read as follows:

Section 76.952 Information to be provided by cable operator on monthly subscriber bills.

(a) The name, mailing address and phone number of the

local franchising authority and the Cable Services Bureau of this Commission.

* * * * *

7. Section 76.953(a) is amended to revise paragraph (a) to read as follows:

(a) Complaint regarding a rate in effect on September 1, 1993.

Notwithstanding paragraph (b) of this section, a complaint regarding a rate for cable programming service or associated equipment in effect on September 1, 1993, must be filed by February 28, 1994, except as provided in Section 76.934(c) with respect to small systems.

* * * * *

8. Section 76.958 is added to Subpart N to read as follows:

Section 76.958 Notice to Commission of rate change while complaint pending

A regulated cable operator that proposes to change any rate while a cable service tier complaint is pending before the Commission shall provide the Commission at least 30 days notice of the proposed change.

9. Section 76.964 is amended to redesignate current Section 76.964 as paragraph (a) and to add new paragraphs (b)and (c).[1]

Section 76.964 Notices to subscribers

(a) In addition to the requirement of Section 76.309(c)(3)(i)(B) regarding advance notification to customers of any changes in rates, programming services or channel positions, a cable operator shall give the relevant franchising authority a minimum of 30 days advance written notification of any changes in rates for cable programming services or associated equipment.

(b) Cable systems shall give 30 days written notice to both subscribers and local franchising authorities before implementing any rate or service change. Such notice shall state the precise amount of any rate change and briefly explain in readily understandable fashion the cause of the rate change (e.g., inflation, changes in external costs or

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[1] Subsection (c) was contained in Erratum released April 14, 1994.

the addition/deletion of channels). When the change involves the addition or deletion of channels, each channel added or deleted must be separately identified. Notices to subscribers shall inform them of their right to file complaints about changes in cable programming service tier rates and services with this Commission within 45 days of the rate or service change being reflected in their bill, and shall provide the address and phone number of both the local franchising authority and the Cable Services Bureau of this Commission.

(c) Cable systems shall provide written notice to subscribers of subscribers' right to file with the Commission complaints concerning rate changes for cable programming service or associated equipment. This notice shall be provided at the same time as the notice required under paragraph (b) and additionally with the first bill reflecting the rate change. The notice shall state that the subscriber may file the complaint within forty-five days of the date the complaintant receives the bill that reflects the rate change, and shall provide the address and phone number of the local franchising authority and the Commission. For rate changes becoming effective before July 15, 1994, operators may provide this notice by any reasonable and feasible means (such as on screen programming or newspaper publication) rather than the written notice otherwise required by this paragraph.

10. A new Section 76.986 is added to Subpart N to read as follows:

Section 76.986 "A la carte" offerings

(a) Collective offerings of unregulated per-channel or per- program ("a la carte") video programming shall not be regulated if: (1) the price for the combined package does not exceed the sum of the individual charges for each component of service, and (2) the cable operator continues to provide the component parts of the package to subscribers separately in addition to the collective offering. The second condition will be met only when the per channel offering provides consumers with a realistic service choice. Collective offerings available on April 1, 1993 shall not be regulated if subsequently offered on the same terms and conditions as were in effect on that date.

(b) In reviewing a basic service rate filing, local franchising authorities may make an initial decision addressing whether a collective offering of "a la carte" channels will be treated as an unregulated service or a regulated tier. The franchising authority must make this initial decision within the 30 day period established for

review of basic cable rates and equipment costs in Section 76.933(a), or within the first 60 days of an extended 120 day period (if the franchise authority has requested an additional 90 days) pursuant to Section 76.933(b). The franchising authority shall provide notice of its decision to the cable system and shall provide public notice of its initial decision within seven days pursuant to local procedural rules for public notice. Operators or consumers may make an interlocutory appeal of the initial decision to the Commission within 14 days of the initial decision. Operators shall provide notice to franchise authorities of their decision whether or not to appeal to the Commission within this period. Consumers shall provide notice to franchise authorities of their decision to appeal to the Commission within this period.

(c) A limited initial decision under paragraph (b) shall toll the time periods under Section 76.933 within which local authorities must decide local rate cases. The time period shall resume running seven days after the Commission decides the interlocutory appeal, or seven days following the expiration of the period in which an interlocutory appeal pursuant to paragraph (b) may be filed.

(d) A local franchising authority alternatively may decide whether a collective offering of "a la carte" channels will be treated as an unregulated service or a cable programming services tier as part of its final decision setting rates for the basic service tier. That decision may then be appealed to the Commission as provided for under Section 76.945.

APPENDIX C -- TECHNICAL APPENDIX

APPENDIX C

TECHNICAL APPENDIX

Since the original benchmark was adopted in the Report and Order, we have made substantial improvements in the methodology for determining competitive cable rates and adjusting to reasonable levels the rates of cable systems subject to regulation. The Commission has improved both the quality of the survey data base and the approach to estimation of the competitive differential. These revisions are based on additional staff analysis, as well as suggestions from commenters. This Appendix reports on data collection and statistical activities that have occurred since the Report and Order.[1]

Data Adjustments

Several commenters identified missing data and errors in the Cable Rate Survey data base that potentially affected the results of the analysis.[2] The staff attempted to improve the quality of the data base by incorporating additional information received after the original data base was constructed. The National Cable Television Association (NCTA) submitted a data diskette with corrections to the

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[1]Copies of our revised data base used in this analysis are available on request. Interested parties should contact the Commission's copy service, International Transcription Service, Inc. (ITS) at (202) 857-3800. It is available in fixed ASCII format or in dBase IV format. Documentation on the data base is also available. Questions about the documentation of the structure of the data base should be addressed to the Office of Plans and Policy, FCC, at (202) 653-5940.

[2] Commenters pointing out the sensitivity of the results to data inaccuracies include Stanley M. Besen and John R. Woodbury, "An Analysis of the FCC's Cable Television Benchmark Rates," Charles River Associates, attachment to Comments of TCI, June 17, 1993, pp. 18-19; James N. Dertouzos and Steven S. Wildman, "Regulatory Benchmarks for Cable Rates: A Review of FCC Methodology," attachment to Comments of Viacom , June 21, 1993, pp. 6, 17; and Declaration of William Shew, Arthur Andersen Associates, attachment to comments of Harron Communications Corporation, p. 9; and Lewis J. Perl, Linda McLaughlin, and Jonathan Falk, "Econometric Analysis of the FCC's Proposed Competitive Benchmarks," National Economic Research Associates, Inc. (NERA), submitted with Comments of Time Warner Entertainment Company, L.P., June 16, 1993, p. 5.

data base, based on phone inquiries to cable systems. The staff randomly checked the changes and determined that the original data were faulty and that the new values fell within a plausible range. The means of variables that contained changes were compared with their original values to confirm that no major changes in the data resulted. Then the NCTA revisions were incorporated into the data base.

Other commenters pointed out specific errors in the data, and some cable systems sent in amended forms. The staff also detected numerous errors in the data. Checks were made to see that values of important variables lay within possible ranges (e.g., that the number of homes passed was greater than or equal to the number of subscribers). For important variables, data points that appeared to be either implausibly high or implausibly low were pinpointed. The variables given particular scrutiny included monthly charge, total number of channels, total number of satellite channels, rate per channel, and number of tier subscribers. Cases that were outliers in the benchmark regressions were also examined. The classification of competitive systems was examined with particular care. Where evidence of data errors appeared from any of these sources, the staff called the cable system to obtain the correct information, which was then incorporated into the data base.[3]

Some of the data amendments made it necessary to change the sample used in the analysis. Survey forms that were received after the initial deadline were edited, coded, and entered into the data base. Eleven new cases were added. Systems that had been in the original data base but that carried only broadcast signals were removed from the data base because they did not meet the statutory definition of a cable system. Five such records were deleted. One record was deleted because the system had just begun operation and

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[3] After correcting the data, we tested the sensitivity of the final regression results to individual observations in the sample by examining Cook's distance. The maximum value of Cook's distance for any observation in the sample was .08, where the critical value at the .005 confidence level is .29. (At higher confidence levels, the critical value is higher.) If the four observations with Cook's distances of greater than .05 are dropped, the competitive differential for overbuild systems including municipal overbuilds (the coefficient of OVL, defined below) remains unchanged to 3 decimal places. R. Dennis Cook, "Detection of Influential Observation in Linear Regression," Technometrics 19 (February 1977), pp. 15-18. Thus our results show very little sensitivity to the presence of any particular observation, which supports reliance on those results.

had only part-year data. One record was deleted because the system served only commercial accounts.

Three groups of cable systems--low penetration systems, overbuilds, and municipals--are subject to "effective competition" as defined in Section 623(l)(1) of the Communications Act of 1934, 47 U.S.C. 543(l)(1). The staff determined membership in the low-penetration portion of the competitive sample by calculating penetration as a percentage of homes in the franchise area (the statutory definition) rather than depending on the systems' reporting of their penetration. Recalculating this variable resulted in the addition of 134 franchise areas to the low-penetration sample and the removal of 4 franchise areas. We believe that much of the increase in the number of franchise areas reported as having low penetration occurred because many systems reported penetration as a percentage of homes passed (the industry convention) rather than of franchise area homes (the statutory definition). We believe that the new sample definition is a more accurate embodiment of the statutory definition than is the old one. Franchise areas that belonged to the overbuild and municipal samples were also included in the low-penetration sample if they met the statutory criterion. Thus the coefficient of the low-penetration dummy variable is interpreted as the effect of low penetration on revenue per subscriber separately from any effect of overbuild competition or municipal status.[4]

In the overbuild sample, 4 franchises were found to have been coded into the wrong competitive classification. Multichannel competitors existed in these franchise areas but failed to meet 1 of the 2 statutory criteria for overbuild competition--50 percent of franchise area homes passed and 15 percent aggregate franchise area penetration by multichannel competitors other than the largest one.[5] Two of these franchise areas were reclassified as low-penetration systems; the other 2 were reclassified as noncompetitive. One new overbuild system was added to the data base. In the municipal sample, the competitive status of 4 franchise areas was misreported. Two of them were reclassified as overbuilds and 2 were reclassified as

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[4] As described in the Regression Results section below use of the new sample leaves unchanged the result that the competitive differential dummy variable is never statistically significant for the low-penetration sample. Including the new low-penetration sample in a single competitive dummy results in smaller and less statistically significant estimates of the overall competitive differential.

[5] See 47 U.S.C. 543(l)(1)(B).

noncompetitive. The systems reclassified as noncompetitive were retained in the sample if they belonged in the randomly-chosen noncompetitive sample; otherwise they were dropped from the analysis.[6] The net result was 1 less overbuild system and 4 fewer municipal systems.

As in the original benchmark analysis, not all of the observations collected were used in the analysis. Data for all systems whose responses to the questionnaires and telephone inquiries established that they met the statutory definition of effective competition were included. Data from a noncompetitive sample consisting of first franchise areas of systems in the random sample that did not face effective competition also were included. Data for systems that were sent questionnaires only because they were believed likely to face effective competition, but subsequently proved noncompetitive, were excluded; data for second franchise areas of systems in the random sample were excluded because they were not independent observations; and data from the sample of 100 largest cable systems were not used unless they also belonged to the random noncompetitive sample or faced effective competition.[7]

The sample used in current analyses consists of 496 records, including 253 noncompetitive franchise areas, 205 in the low-penetration sample, 45 in the overbuild sample and 12 in the municipal sample.[8] Of the low-penetration

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[6] The sample to which the survey questionnaires were sent consisted of a 1 percent random sample of cable franchise areas, plus all systems identified as facing multichannel competition, all systems believed to have less than 30 percent penetration, and the 100 largest cable systems. The questionnaires collected information about the system as a whole and, for 2 franchise areas, information specific to the franchise area. One of these franchise areas was the one to which the questionnaire was addressed (first franchise area); the other was the remaining franchise area that faced competition and had the largest number of subscribers or, if no other franchise area faced competition, the remaining franchise area with the largest number of subscribers (second franchise area). The noncompetitive sample used in the analysis consists of all first franchise areas in the random sample except those determined to face effective competition.

[7] Twenty-three franchise areas in the sample used for analysis and 16 in the final regression belonged to the top 100.

[8] The overbuild numbers here pertain to the original overbuild sample, not including systems in the municipal sample. See below.

franchise areas, 14 also belong to the overbuild sample and 4 belong to the municipal sample. Some observations dropped out of the analysis sample in the regression analysis because of missing data. The sample used in the final regression consists of 420 records, of which 237 were in the noncompetitive sample, 148 in the low-penetration sample, 39 in the overbuild sample, and 11 in the municipal sample.[9] Of the low-penetration franchise areas in this sample, 11 belong to the overbuild sample and 4 belong to the municipal sample. This sample includes 74 more low-penetration franchise areas and 8 more overbuilds, but 4 fewer municipal systems, than the sample in the original benchmark regression. There were more overbuilds in the regression sample despite a net reduction in the total number of overbuilds because corrections in the data caused fewer observations to be unusable because of missing data.

Disaggregation of the Competitive Sample

In the Report and Order, we noted that the three competitive samples that we identified based on the statute--overbuilds, municipals, and low penetration--had very different price behavior. In the benchmark regression, using a single dummy variable for all three samples produced a coefficient of -0.094, but when the low penetration systems were excluded from the sample, the differential increased in magnitude to -.28. When we used separate dummy variables for each of the three competitive samples, we found that the coefficient of the variable for the low penetration sample was positive, albeit small, and statistically insignificant, while the other 2 competitive dummy variables had negative and statistically significant coefficients. Because the differences among the coefficients of the dummies for the three separate competitive samples were statistically significant, we concluded that it was inappropriate to lump them together and represent them with a single variable in the regression analysis.[10] Therefore, it was decided early on to estimate

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[9] Some intermediate regressions contain different numbers of observations because they use different variables with different missing data for different observations.

[10] An F test applied to the variables representing the 3 competitive samples showed that they were statistically significantly different at much better than the 1 percent confidence level. Arthur S. Goldberger, Econometric Theory (New York: John Wiley & Sons, Inc., 1964), pp. 173-176; Potluri Rao and Roger LeRoy Miller, Applied Econometrics (Belmont, California: Wadsworth Publishing Company, Inc., 1971), pp. 145-148.

separate coefficients for each of the three groups. Hazlett argued that the low penetration observations should be dropped because they would distort the analysis.[11] However, our disaggregated approach to estimating the competitive differential is robust to their inclusion or exclusion.[12]

We examined carefully each of the three samples defined as "effectively competitive."[13] In some cases the variables were refined to improve their ability to represent actual economic competition.

Low penetration sample. While low penetration may be associated with sharing a market with a competitor, it may also result from other conditions unrelated to competition. A system that has just begun operation or a system that serves a low-income neighborhood may have low franchise area penetration as a consequence. Low penetration may also result from high prices or poor service.[14]

Further, the statutory definition of low penetration is based on homes in the franchise area, not homes passed by the system. Yet cable systems frequently offer service only to a portion of the franchise area, often because the

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[11] Affidavit of Thomas W. Hazlett, attachment to Joint Comments of Bell Atlantic, GTE, and the NYNEX Telephone Companies, pp. 11-12.

[12] After a model was selected, it was also estimated by dropping the low penetration data from the database and dropping the dummy variable that identifies those cases. This was done because the coefficient of the low penetration dummy variable was not significantly different from zero, but dropping that variable would have the effect of including the low penetration cases in the baseline (noncompetitive) data unless the low penetration cases were eliminated from the sample. The resulting estimates of the coefficients of the competitive effects for the overbuild and municipal samples were almost indistinguishable from the estimates reported here; the coefficients differed by less than .01.

[13] Kelley recommends a comprehensive analysis of all the effectively competitive systems to determine whether their inclusion is appropriate. Daniel Kelley, "Economic Issues Raised by the Further Notice," Hatfield Associates, Inc., submitted with the Comments of Time Warner Entertainment Company, L.P., June 17, 1993, pp. 5-6.

[14] Hazlett (pp. 5-11) presents evidence suggesting that low demand, high prices, or poor service are commonly associated with low penetration.

remainder of the franchise area is sparsely populated or for some other reason too costly to serve. Thus low penetration may reflect the geographic limits of the system rather than competition or anything related to system service or choices of potential subscribers. In fact, of the low-penetration systems in our analysis sample, 37 percent have more than 30 percent penetration of homes passed. For these reasons, low penetration, as defined in the statute, appears unlikely to be a useful indicator of competitive behavior.

Low-penetration systems might have higher prices than equally competitive systems if they faced systematically higher costs. One cause of high costs per subscriber might be low demand, requiring systems to spread fixed costs over a smaller number of subscribers. As described below, we estimated a variety of equations including several cost and demand proxies.[15] The low-penetration coefficient remained statistically insignificant.

Overbuild sample. Next we attempted to refine the measurement of competition for the augmented overbuild sample. Many systems face competition in only a portion of their service areas.[16] We hypothesized that the intensity of competition a system faces in a franchise area varies with the amount of actual overlap with a competitor, that is, the fraction of households the system passes that are actually passed by a competitor. While the data do not permit us to calculate this proportion precisely, we constructed a variable that forms a lower bound for it.[17]

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[15] Commenters arguing in favor of including additional variables in the equation to estimate precisely the effects of variables representing competition, rather than excluding low-penetration observations from the sample, include Stanley M. Besen and John R. Woodbury, "A Further Analysis of the FCC's Cable Television Benchmark Rates," Charles River Associates, July 2, 1993, p. 7; Lewis J. Perl, Linda McLaughlin, and Jonathan Falk, "Econometric Issues Raised by the Further Notice," NERA, July 1, 1993, p. 3; and Daniel Kelley, "Economic Issues Raised by the Further Notice: Evidence from Low Penetration Systems," Hatfield Associates, Inc., July 2, 1993, pp. 1, 3.

[16] Of the systems in our full analysis sample that face competitors, only 31 percent face competition in their whole service area. Forty-seven percent face competition in between 50 and 100 percent of the service area, and 22 percent face competition in less than 50 percent of the service area.

[17] For each overbuild observation, the overlap variable constructed is:

This overlap variable takes on a value between zero and one for all observations in the augmented overbuild sample and takes on a value of zero for all other observations.

The overlap variable described above measures overlap within a franchise area. Many systems, however, charge uniform prices in all franchise areas. In these cases, the appropriate geographic area for the measurement of competitive overlap is the system service area, not the franchise area. The distinction is empirically important in cases where a system with many franchise areas faces competition in only one or a few franchise areas. In these cases, if the degree of overlap in franchise areas with competition is taken as the measure of competition, the extent of competition to the system will be overstated because the diluting effects of franchise areas without competition will not be taken into account. This mismeasurement will cause the effect of competition on price to be understated, since the observed price response will have been caused by a smaller proportion of homes with competition than the measured proportion. This effect is likely to be greater in large than in small systems because if only one or a few of many franchise areas is competitive it is likely to constitute a smaller proportion of the whole system. Understating the effect of competition on price for large systems might introduce an erroneous appearance that the effect varies with system size.

To account for this effect, for overbuild systems (including municipal ones) we estimated the percentage of homes passed in the entire system service area that are also passed by a competitor. Again, the data permit only an

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$$O_1 = (HP_1 + HP_2 - H_t) / HP_1,$$

where HP_1 is homes passed by the system in the franchise area, HP_2 is homes passed by the competing system in the franchise area, and H_t is total homes in the franchise area. The data on homes passed by competing systems were not originally entered in the data base, but were obtained from the questionnaires. The variable cannot be less than zero because in every case at least 2 systems in the franchise area pass at least 50 percent of homes, as required by the statutory definition of effective competition in overbuild situations. Economic competition, however, may well be created by systems passing less than 50 percent of homes in a franchise area, which would tend to bias the coefficient toward zero.

estimate, not an exact calculation.[18] We constructed a combined overlap variable (designated OVL) that uses the system overlap measure for overbuild systems that report that they charge the same prices in all franchise areas, and uses the franchise area overlap measure for other overbuild systems. The variable takes on the value of zero for non-overbuild systems.

If any two of the three overbuild variables (i.e., franchise overlap, OVL, and B) were included in the regression, none had a significant coefficient due to multicollinearity between the variables. The system overlap variable OVL resulted in a better fit than the franchise area overlap variable. Of the three taken individually, the franchise overlap variable resulted in the worst fit.[19] When B was included and OVL was excluded, the regression had as good a fit as the one where OVL was included and B was excluded.[20] Thus it appears that statistically either B or OVL is an equally good measure of the competitive effect. We chose OVL because we believe it captures the effect of head-to-head competition better than a simple zero-one dummy variable. Therefore, we selected OVL as the best measure of

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[18] As noted above, for systems with more than 1 franchise area the questionnaires collected detailed franchise-level data for only 2 franchise areas. For these 2 franchise areas, data are available on homes passed and franchise area households. We know the number of other franchise areas, and for every franchise area where a competitor passes more than 50 percent of homes, we have the percentage of homes passed by the competitor. We estimated the actual percentage overlap, as described above, for the 2 franchise areas with information on homes passed. For other franchise areas, we assumed no overlap where no competitor was reported and 100 percent overlap where a competitor was reported. We assumed that all franchise areas after the first 2 have the same number of homes passed. System overlap was calculated as follows:

$$O_S = O_1(HP_1/HP_S) + O_2(HP_2/HP_S) + O_3(HP_S - HP_1 - HP_2)/HP_S$$

where O_1 is percentage overlap in franchise area 1, O_2 is percentage overlap in franchise area 2, O_3 is percentage of franchise areas after the first 2 with more than 50 percent of homes passed by a competitor, HP_1 is homes passed in franchise area 1, HP_2 is homes passed in franchise area 2, and HP_S is homes passed by the system.

[19] I.e., the R^2 value was lower. However, the coefficient was statistically significant.

[20] I.e., the R^2 value was identical to 4 decimal places.

competition.

OVL is generally positive for both the B (overbuild) and C (municipal) samples, but not the A1 (low penetration) sample. Therefore, when OVL is included along with B and/or C, the coefficients of B and C reflect the price deviation from the level estimated for the degree of competition measured by OVL. When OVL is excluded from the regression, the coefficients of B and C reflect the price deviation from the level estimated for no competition.[21]

Municipal sample. The effects of municipal ownership on the pricing behavior of cable systems is unclear a priori. City governments might choose to subsidize cable service, directly or indirectly, as a service to residents, causing municipal systems to have low costs and prices relative to private ones; municipal governments might view cable service as a source of revenues to subsidize other services; or, finally, municipal governments might view cable systems as neither a source of subsidies nor as a service to subsidize.

The municipal sample in the survey consists of pairs of systems, a municipally-owned system and a privately-owned competitor, serving the same area. In order to test the possibility that municipally-owned systems have lower costs or different objectives than their private rivals, we constructed separate dummy variables for the 2 municipal subsamples. The difference between their coefficients was not statistically significant, so we retained a single municipal dummy variable.

All but 2 of the systems in our municipal sample met the overbuild criterion as well.[22] Consequently we included the overbuild municipal systems in the overbuild sample, creating an augmented overbuild dummy variable. This variable had a value of 1 for franchises in the augmented overbuild sample and 0 otherwise. In subsequent analyses, we used a variable representing overbuild status and a separate variable representing the additional effect of belonging to the municipal sample.

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[21]In either case, since OVL is usually zero for the A1 sample, the coefficient of A1 measures the deviation from the level estimated for no competition.

[22] The other 2 municipal systems also consist of a public-private pair, but the private system has far less than the 15 percent penetration required for overbuild competition. See 47 U.S.C. 543(l)(1)(B)(ii).

Equations Estimated for Our New Model

Using the random sample and the samples of overbuilds, municipals, and low penetration franchises, we estimated various equations using ordinary least squares multiple regression analysis. The use of multiple regression analysis permits the estimation of the separate impact of each variable included in the regression, holding the other variables constant. The main purpose of the regressions was to estimate the impact of competition on rates. Therefore, the variables that were of primary concern were those designed to measure the competitive effect. However, many other characteristics of systems and their markets affect rates. If the effects of these factors are not accounted for, and if they differ between competitive and non-competitive systems, they may bias the estimates of the variables measuring the effects of competition.[23] Accordingly, an attempt was made to include in the model as many other variables as one could reasonably argue to be relevant and were found to have coefficients that were statistically significantly different from zero.

Functional Form

Both linear and logarithmic forms of the dependent variable were tried. The choices of the independent variables that resulted in the best fit were the same regardless of which form of the dependent variable was used. In terms of overall statistical fit, there was little to choose between a linear and logarithmic dependent variable; the difference between the fits was insignificant.[24] In light of this statistical insignificance, we considered the underlying economic situation being analyzed. The logarithmic form assumes constant percentage effects of changes in the independent variables, which can be estimated using the coefficients. This implies that the competitive

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[23] Comments arguing that omitted variables may have biased the estimate of the effect of competition include Dertouzos and Wildman, pp. 8-13, 24; Shew, p. 16; Ernst & Young, "A Review of the FCC's Benchmark Formula and Proposed Revisions," attachment to Supplemental Comments of the Medium Sized Operators Group, August 4, 1993, pp. 6-16; Besen and Woodbury, July 2, 1993, p.7; and NERA, June 16, 1993, pp. 6-7.

[24] For the full sample, the linear version of the dependent variable had a slightly better fit. However, when the low penetration franchises were dropped from the sample, the logarithmic version of the dependent variable had a slightly better fit.

effect is a constant percentage reduction in rates. On the other hand, the linear form implies that the competitive effect is a constant dollars and cents reduction in rates.[25] We were not aware of a plausible economic model that would produce price-margins with constant absolute markups across systems. To the extent that higher rates are indicative of higher price-cost margins, the constant percentage differential is more appropriate. Accordingly, we chose the logarithmic form for conducting most of the analysis.

In the logarithmic form that was used, we took natural logarithms of only some of those variables whose values were always positive. The size variables, measuring the number of system subscribers and the number of channels, were found to give a better fit as reciprocals (which have values of between 0 and 1). In addition, logarithms were not taken of dummy variables (whose value is either 0 or 1) or proportions (whose value could be 0).

Thus the general form that was used was

$$\ln y = a + b_1 \ln x_1 + b_2 \ln x_2 + \ldots + c_1 p_1 + c_2 p_2 + \ldots + u$$

where ln denotes the natural logarithm, y is the dependent variable, the x's are the positive independent variables, the p's are the dummy variables, proportions, and reciprocals, and u is the random error term.[26] The estimated coefficients are a, which is the intercept, the b's, which can be interpreted as elasticities for the x's (the percentage change in y associated with a one percent

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[25]Using the linear model with the full sample, the estimated coefficients of the competitive variables (described below) were -$0.22 for A1, -$3.26 for OVL, and -$3.72 for C.

[26]In non-logarithmic format, the equation corresponds to $y = e^{a} x_1^{b_1} x_2^{b_2} \ldots e^{c_1 p_1} e^{c_2 p_2} \ldots e^{u}$.

increase in the x value),[27] and the c's, from which we can compute the proportionate impact d_i of a change in p_i from 0 to 1 using the formula $d_i=e^{c_i}-1$, where e is the base of the natural logarithms.[28]

Variables Used

The dependent variable used in the regression analysis was the average franchise area revenues from regulated services per subscriber per month, expressed in logarithmic form. This was used, instead of a quoted rate for basic service, because there may have been different amounts and directions of cross-subsidies among services for different cable companies.[29]

The dependent variable was recalculated to improve the

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[27]The relationship between elasticities and percentage changes is only approximate. The approximation is better, especially for large percentage changes, if the percentage change is computed on the basis of the average (of the before and the after) level rather than the beginning level. For example, if a value increases from 10 to 20, this is a 100 percent increase from the beginning level, while a decrease from 20 to 10 is a 50 percent decrease from the beginning level. If the average level of 15 is used as the basis of computing the percentage change, both the increase and the decrease are 67 percent changes from this average level.

[28]Changes in the independent variable that are smaller than from 0 to 1 have an impact that is exponentially smaller. In general, a change in p_i from f to g would imply a change in the dependent variable of $e^{c_i(g-f)}-1$. The smaller the change, the closer the coefficient c_i approximates an elasticity.

[29]For example, some cable companies may have charged a low basic service price to entice people to become subscribers and then charged high prices for optional services to subsidize the cost of basic service. Other companies may have charged a high basic service price and low prices for optional services to entice customers to get the optional services.

measurement of equipment and installation revenue and franchise fees. The estimates in cases of missing data were carefully checked.[30] The staff had information suggesting that cable systems rarely charge full list price for installations, which would cause the calculated value of installation revenue to overstate the true value.[31] To correct for this bias, franchise area installation revenue was estimated from system installation revenue, multiplied by the proportion of system subscribers in the franchise area.[32] The franchise fee calculation was also made slightly more precise by including equipment revenue in the base on which franchise fees are calculated when franchise fees are based on total subscriber revenue and not itemized. The revenue variable was then recalculated on a per-subscriber, rather than subscriber-channel, basis.[33]

The independent variables in the regression can be grouped into the following categories: competitive variables, size variables, product mix variables, and other cost variables. Various different variables were tested for inclusion in each of these categories. The ones that were included in our final equation are discussed here. Others that were tried and eliminated (generally because their estimated coefficients were not significantly different from zero) are discussed in the next section.

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[30] The structure of the questionnaire caused data on quantities of equipment and installations not to be reported for some franchise areas. As in the calculations for the original benchmark, we estimated franchise area equipment revenues from system equipment revenues in some cases where franchise area data were missing. If no prices were reported for equipment, we assumed that the franchise bundled all equipment charges, and we made no adjustment. If the franchise reported any equipment prices, but no quantities, we estimated equipment revenue assuming the same proportion of equipment revenue to revenue from tier charges in the franchise area as in the system as a whole. Besen and Woodbury (June 17, 1993, pp. 18-19, 26-28) note the problems of adjusting for incomplete equipment information.

[31] NERA, June 16, 1993 (p. 6) points out that installations may have been discounted or even free.

[32] The variable was not calculated for 15 cases where the revenue data were obviously incorrect. These cases were excluded from the analysis.

[33] Dertouzos and Wildman (pp. 5, 10) point out the difficulties of interpretation caused by having similar measures of channels on both sides of the equation.

The key variable used to measure the effect of competition is overlap, the proportion of the service area that is also served by a competitor. This variable can take any value from 0 to 1, with 0 representing no competition and 1 representing competition in the entire service area. The version of this variable that gave the best fit, labeled OVL, uses the system area as the service area for those franchises that reported that the same rates were charged for all franchises of their system, and uses the franchise area as the service area if the rates differ among the franchises of their system (or if there is only 1 franchise in the system). The coefficient of this variable is the primary basis for the measure used to determine the price differential that is deemed to be due to competition, other things being equal.

A second variable reflecting membership in a group defined by the statute as competitive is a dummy variable for low penetration.[34] This variable is identified as A1.[35]

There are three other variables that might be considered to be a hybrid of competitive and other cost variables. One of these is C, which is a dummy variable which is 1 for municipally owned franchises or privately owned franchises competing against municipally owned franchises. It could be argued that municipally owned franchises have lower costs due to direct or indirect government subsidies or other factors. On the other hand, as noted below, it appears that the privately owned franchises may be charging rates that are even lower than the model would otherwise predict compared to the municipally owned ones they compete against, which would tend to support the argument that the coefficient of this variable measures the impact of more intense price competition than is picked up by the overlap variable. As an indication of this, the length of time that the municipals have been subject to competition has on average

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[34]There were 11 franchises that were classified as both low penetration and overbuilds and 4 franchises that were classified as both low penetration and municipals.

[35]As noted above, when this variable was dropped from the regression because its coefficient was not significantly different from zero, the low penetration observations that were not also overbuilds or municipals were dropped from the regression estimation.

been less than that of the overbuild sample,[36] and it is generally accepted economic theory that price competition tends to be more intense in the early years of competition.

The other 2 hybrid variables are related to whether the system is connected to a multiple system operator (MSO). One, identified as MSO, is a dummy variable, which is 1 if the system is connected to a multiple system operator and 0 if it is not. The other is the number of systems connected to the multiple system operator; in log form it is identified as LMS.[37] These variables could measure cost differences between MSO and non-MSO systems, which could result from monopsony power or differences in the quality of service (or other nonprice dimensions of the product offering) not reflected in the other variables included in the regression.[38] It may also reflect other behavioral differences between MSO and non-MSO systems.

There are 2 dimensions of size reflected in our model. As noted above, these are both entered in our model in reciprocal form. One is the total number of channels,[39] which is identified in reciprocal form as RTC. The other is the number of subscribers, for which we have used the number of subscribers in the system. It is identified in reciprocal form as RSS.

There are 5 product mix variables in our model. One is the proportion of channels that are cable-only (i.e., non-

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[36]For the municipal sample the average length of time that there has been competition is 3.3 years, while for the overbuild sample (excluding municipals) it is 8.9 years. The range is 1 to 8 years for the municipal sample and 1 to 26 years for the overbuild sample.

[37]This variable takes the value of 0 (the log of 1) for non-MSO systems.

[38] For example, Ernst & Young argues that the cost of rebuilds should be considered. "A Review of the FCC's Benchmark Formula and Proposed Revisions," Ernst & Young, submitted with Supplemental Comments of the Medium-Sized Operators Group, August 4, 1993, pp. 11-13. Although we do not have data on such costs, it may be that MSOs are more likely to engage in rebuilding their systems.

[39]For companies with more than 1 tier of service, the numbers of channels are a weighted average of the channels for all tiers, with the number of subscribers to each tier being used as the weights.

broadcast), identified as PNB.[40] The cable company usually has to pay a fee to the channel originator on a per-subscriber basis for these channels. Therefore, higher values of PNB should be associated with higher costs. Also, lower values of PNB may reflect a greater degree of competition with over-the-air broadcasting. The others are variables which relate to equipment or services for which subscribers are usually charged extra beyond the charge for basic service.[41] As noted above, the revenues from these services are included in our dependent variable.[42] Each of them is measured as the proportion of subscribers in the franchise that get these extra services, or, in the cases where subscribers may get more than 1, the ratio of the number of these services provided to the number of subscribers. These variables include the ratio of the number of additional outlets to the number of subscribers, identified as PAO; the proportion of subscribers to the second tier of channels beyond the basic tier, identified as PT2;[43] the ratio of the number of tier subscription changes to the number of subscribers identified as PTC; and the ratio of the number of remotes rented to the number of subscribers, identified as PRM.

The remaining variable in the model reflects other costs. It is the median income in the franchise area as

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[40] Commenters asserted that using the number of satellite channels as an explanatory variable in our original benchmark discriminated unfairly against cable-only channels that are delivered by non-satellite technologies. Comments of Affiliated Regional Communications, Inc.

[41] NERA (June 16, 1993, p.7) argues that equipment quantities are important to consider.

[42] Besen and Woodbury (June 17, 1993, pp. 17-18) criticized the Commission's previous model for including these extra charges in our dependent variable but not accounting for them properly. Their suggestion to use a fixed-weight price index is inappropriate because of the cross-subsidy problem noted above and because, for many cable systems, the quantities of these extras are zero and the prices are nonexistent.

[43] Ernst & Young (pp. 6-8) argues that second-tier channels are likely to have higher programming costs than basic tier channels. In our model PNB should also reflect programming cost differentials.

determined from the 1990 Census.[44] This variable, identified in log form as LIN, is included to reflect differences in wage rates[45] of employees, and possibly other costs that might be correlated with wage rates.

Regression Results

Table A-1 shows the results of our regression estimates. The top part of the table shows the estimated coefficients and their standard errors. As noted above, the coefficients of the logarithmic variables can be interpreted directly as percentage impact estimates. However, the impacts of the proportion and dummy variables must be

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[44] This is one of several population characteristics for each service area that were used to check for the effects of differences in the demand for cable service. Differences in demand elasticity might be expected to affect the amount by which noncompetitive systems are able to mark up their prices, and thus might affect the size of the competitive differential. To measure such effects, we used population characteristics that had been found to be significant determinants of demand for cable or telephone service in previous studies. These included percent of population below the poverty line, percent of population urban, percent of population non-English-speaking, percent of households containing a single person, percent of homes that are owner-occupied, percent of households with children under the age of eighteen, percent of population of white race, and median household income. Data were obtained from the 1990 Census for Zip Code areas corresponding to cable franchise areas in the data base. Desired variables were constructed from Census categories and merged with the survey data.

In a few cases survey and Census records could not be matched by Zip Code. In cases where the Zip Code had changed since the 1990 Census, community names were found that matched the current Zip Code. In cases where no data existed for a Zip Code, for instance where it represented an office building, maps, street addresses, and a Zip Code directory were used to find Zip Codes of adjacent areas.

[45] One might argue that the inclusion of the income variable could reflect demand effects rather than cost effects. However, as shown below, our estimate that shows the possible effect of simultaneous equations bias due to the interaction of supply and demand results in a coefficient of the income variable that is only slightly different from the ordinary least squares estimate, indicating that our estimated coefficient primarily reflects costs rather than demand.

computed from the coefficients. The bottom part of the table shows those computed estimates of the impacts of changing the values of the variables from 0 to 1.[46]

As indicated above, the low penetration variable A1 has a coefficient that is not significantly different from zero, indicating that these franchises charge rates which are on average little different from the noncompetitive franchises. Its coefficient of -.010 implies that their rates are only about 1 percent lower on average than comparable noncompetitive franchises. OVL has a coefficient of -.174, which implies that the franchises facing competition throughout their service area have rates that are about 16 percent lower than comparable noncompetitive franchises.[47] The municipal variable C has a coefficient of about -.231, which implies that the municipal sample has rates that are about 21 percent lower than comparable other competitive franchises and about 37 percent lower than comparable noncompetitive franchises.

The regression estimate indicates that MSO franchises charge rates that are about 7 percent higher than non-MSO franchises, and that the franchises of MSOs with larger numbers of systems charge slightly higher rates than MSOs with fewer systems. A 100 percent increase in the number of systems in an MSO is associated with a 1 percent increase in rates.

Other things being equal, franchises of large systems have lower rates than those of small systems. This probably reflects the spreading of fixed costs over more subscribers. Because of the nonlinear nature of the RSS variable, its impact is not as clear as the other variables. However, the primary impact of system size is for very small systems.

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[46]Because the reciprocals never take on the values of either 0 or 1, the computation of corresponding impact estimates for those variables is inappropriate. The equation in footnote 6 above should be used to determine the impacts of changes in those variables, where *f* and *g* are the reciprocals.

[47] A dummy variable B for the original overbuild sample used in place of OVL has a coefficient of -.140, implying rates about 13 percent lower than those of comparable noncompetitive franchises. In this specification the municipal variable C has a coefficient of -.340, implying municipal rates about 29 percent lower than noncompetitive rates. The comparison group is noncompetitive systems in this case because there is no overlap between B and C.

The coefficient implies that a system with 810 subscribers charges an average rate that is only about 1 percent higher than that of the largest system. But that same system of 810 subscribers would have an average rate that is 36 percent lower than the smallest system in our sample, which has only 18 subscribers.

Other things being equal, rates increase as the number of channels increase, but the relationship is nonlinear. The coefficient of RTC implies that an increase in the number of channels from 7 (the smallest in our sample) to 14 is associated with an 11 percent increase in rates, while an increase in the number of channels from 35 to 70 (the largest in our sample) is associated with a 2 percent increase in rates.

The coefficient of PNB indicates that a franchise with no broadcast channels would have rates that are 29 percent higher than a franchise with all broadcast channels. A smaller and more realistic change of 10 percentage points (e.g., from 60 to 70 percent) is associated with rates that are less than 3 percent higher.

Higher average rates are also associated with optional equipment and features. This is to be expected, because the charges for these options are included in these average rates (which are really average revenues per subscriber from regulated services). Franchises where there is an average of 1 additional outlet rented per subscriber have average rates that are 11 percent higher than those where no one rents additional outlets. Franchises where there is an average of 1 remote rented per subscriber have average rates that are about 19 percent higher than ones than those where no one rents remotes. Franchises where every subscriber subscribes to Tier 2 have average rates that are 6 percent higher than those where no one subscribes to Tier 2. Franchises where there is an average of 1 tier change per 10 subscribers have rates that are less than 4 percent higher than those where no one changes tiers.[48]

Higher labor costs, as estimated by the income variable are also associated with higher rates, with a 100 percent increase in labor cost being associated with rates that are about 7 percent higher.

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[48] The coefficient indicates that franchises where there is an average of 1 tier change per subscriber have rates that are 42 percent higher than those where no one changes tiers. However, in practice there are no franchises in the sample with a value of 1 for PTC. The average value is only .01.

Other Variables Tried and Eliminated

There were many other variables tested for inclusion in the model, either because we felt they might influence rates or because commenters argued that they should be included. In most cases they were eliminated because their coefficients were not statistically significantly different from zero at the 95 percent confidence level. However, as noted below, in a few cases the variables were excluded because of other problems. In most cases, the inclusion of these additional variables has little impact on the estimated coefficient of OVL.[49] The few exceptions to this included values that were both lower and higher for that coefficient. Therefore, we believe that our estimate of the competitive differential is reasonably robust to alternate choices of variable inclusion.

In our regressions we considered several variables that measured the length of time (in years) during which competition had been in place, as measured by the age of the newest headend among the competitive systems operating in a franchise area. Our expectation was that the competitive differential would diminish over time, because price wars are more common in the early stages of competition and collusion and non-price competition are more common in later stages of competition.[50] Our best estimate involving this type of variable confirmed this, showing a competitive differential for the overbuilds that started at 24 percent for brand-new competition, then diminished to 17 percent after five years and to zero after fifteen years. The problem with this variable is that the oldest competitive systems were 26 years old, at which point the coefficient implies that overbuilds have rates that are 21 percent higher than non-competitive systems, which is implausible. Consequently, we rejected specific use of this variable in our final model because it leads to implausible estimates. We tried several other functional forms, however, which generally yielded the conclusion that the prices rise with the duration of competition. We did not pick any one variable or functional form as the right one.

We tried an interaction between OVL and MSO. This variable did not have a significant coefficient. This would indicate that the competitive differential is approximately the same for MSOs and non-MSOs.

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[49] I.e., the coefficient changes by less than .01.

[50] Shew (pp. 12-15) argues that systems that have been competing for 5 years or less are more likely to engage in price wars and thus charge lower prices.

We tried including separate dummy variables for the municipally owned systems and the privately owned franchises competing against the municipally owned systems. The coefficient for the privately owned franchises was more negative than that of the municipally owned systems, indicating that the private firms were charging rates that were lower than the model would predict for comparable municipally owned systems. However, the difference between the 2 coefficients was not statistically significant. Therefore, we decided to include just 1 variable, C, for the municipal sample.

We tried various other functional forms for the subscriber variable.[51] These included a linear version, a logarithmic version, and the reciprocal of the logarithm. The reciprocal of the number of subscribers gave the best fit. This form of the variable is compatible with the concept of fixed costs being spread over the number of subscribers. As an alternative to the use of system subscribers, we tried using franchise subscribers, again using various functional forms. This resulted in a slightly worse fit for the regression. When both system and franchise subscribers were included in the equation, only system subscribers had a significant coefficient. We also tried a subscriber variable analogous to OVL, which was equal to system subscribers if the same rates were charged to all franchises in a system, and franchise subscribers otherwise. This also yielded a worse fit than system subscribers. Therefore, we selected RSS as the best measure of the number of subscribers.

As an alternative to RTC as the channel variable, we also tried the log of average total channels.[52] This resulted in a worse fit. As alternatives to PNB, we also tried using the proportion of various other channel groupings, including satellite only, satellite and other,[53] and non-local broadcast. These all resulted in worse fits, as did including the groupings of channels as totals instead of proportions. We also tried adding a dummy variable for

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[51]Dertouzos and Wildman (pp.7-8) suggested using alternate functional forms to estimate scale economies.

[52]As noted above at note 40, average channels are weighted averages across all tiers of service.

[53]"Other" means cable-only channels that are not satellite channels and not public, educational or government (PEG) access channels. NERA (June 16, 1993, p. 6) argues that PEG channels are important.

six or more local broadcast signals.[54] This variable did not have a significant coefficient.

Various other product mix variables were also tried. These included installations per subscriber, disconnects per subscriber, reconnections per subscriber, churn per subscriber (the sum of the above three), tier 3 subscriptions per subscriber, converters rented per subscriber, and addressable converters per subscriber.[55] These generally had insignificant coefficients.

We also tried various other cost variables. These included percentage urban,[56] line miles in the franchise area, line miles in the system, density (for the franchise area and the system),[57] defined either as households passed per line mile or as subscribers per mile, percentage of plant below ground,[58] percentage of fiber,[59] and the age of the principal headend.[60] In addition, we tried the amount of revenue per system subscriber from pay TV and advertising.[61] None of these variables had coefficients that were statistically significant. It is not clear which

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[54]Dertouzos and Wildman (p. 12) argue that competition from six or more local broadcast channels tends to hold rates down. See also Comments of Continental Cablevision, Inc., pp. 6-9.

[55]Dertouzos and Wildman (pp. 10-11) argue that addressability is important.

[56] Ernst and Young (pp. 13-14) argue that population density is important. This should be reflected in the percentage urban variable.

[57]NERA (June 16, 1993, p. 6) and Ernst and Young (pp.13-17) argue that density is important.

[58]NERA (June 16, 1993, p. 7) and Shew (p. 16) argue that the percent below ground is important.

[59]Dertouzos and Wildman (p. 11) argue that fiber is important.

[60] Dertouzos and Wildman (p. 11) argue that age is important. Mileage, density, age, and revenue per subscriber variables were tried in both linear and logarithmic form. Density was also tried in reciprocal form.

[61]Dertouzos and Wildman (pp. 10-11) argue that such revenues are important.

of these cost variables should be reflected in rates if the firms are basing rates on marginal costs.

We also tried various demographic variables derived from the 1990 decennial Census.[62] These included percent of the population below the poverty line, percent urban, percent non-English speaking, percent white, percent of households containing a single person, percent owning their homes, and percent with children under the age of 18. These are all variables that are more likely to affect demand than supply. None of them had statistically significant coefficients.

System Size and the Competitive Differential

Several commenters pointed out that, using our original equation, the competitive differential was large and statistically significant for small cable systems but statistically insignificant for large cable systems.[63] We were able to replicate these results with our cleaned-up data. We analyzed possible explanations for this finding and explored whether the apparent difference in the competitive differential by system size was either due to faulty measurement or to interactions between competition and other variables affecting revenue per subscriber. We expected that construction of a system overlap measure to improve the measurement of competition for large systems would eliminate the difference in the competitive differential by system size. As noted above, this variable has a larger and more significant coefficient and explains more of the variance than the franchise level overlap variable. But if a dummy variable for small (less than 5000 subscribers) competitive systems is added, the coefficient of the system overlap variable becomes insignificant.

One possible explanation of the difference in the competitive differential with system size is that large systems facing competition are more sophisticated than small ones and have learned to collude more effectively with their rivals. If this explanation is correct, it suggests that

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[62]Kelley (July 2, 1993, p. 4) argues that demographic variables are important.

[63]Besen and Woodbury (June 17, 1993, pp. 21-26); Economists Incorporated, "The Effect of 'Competition' on Rates Differs for Large and Small Cable Systems." NERA (June 16, 1993, pp. 2-3) argues that systems with over 10,000 subscribers behave differently from those with under 10,000 subscribers, and that these 2 groups have different competitive differentials.

the competitive differential for small systems is closer than that for the whole sample to the true effect of competition on price. Nevertheless, any partitioning of the data into size classes will be arbitrary, since we know nothing about the technology or economics of cable systems to suggest a rationale for the choice of size classes. Given the small size of the competitive sample, dividing it still further and attempting to draw inferences from a still smaller sample appears unwarranted. Thus we believe that any estimate used for rate regulation should be based on the entire sample.

We tried interactions between OVL and system size, using various functional forms. In most cases, this interaction was not statistically significant or it resulted in a very high degree of multicollinearity with the OVL variable and yielded coefficients of unreasonable magnitudes. The one functional form that did seem to work was a linear one involving the product of OVL and system subscribers. The coefficient estimates using this form imply that rates for competitive franchises of larger systems rise to the level of non-competitive ones.[64] But when extrapolated beyond the range of observed values for this interaction variable, the equation predicts implausibly high values for the dependent variable.[65] In addition, in our sample of municipals and overbuilds, there is a high correlation between system subscribers and length of competition.[66] We noted above that the competitive differential for overbuilds declines as the duration of competition increases, possibly because cable operators learn over time to engage in parallel pricing strategies. This leads us to conclude that if there is an interaction between competition and system size, it may take the form of franchises of large systems engaging in less vigorous price competition, and thus charging prices approximating those of the non-competitive sample.

As a further attempt to isolate a possible interaction

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[64]This is the result of the coefficient of this interaction variable being positive. The best fitting model which includes this interaction variable indicates that the competitive effect disappears at about 43,000 system subscribers.

[65]For a fully competitive system that would have the same characteristics as the largest noncompetitive system in our sample, the model predicts a rate of over $200 per subscriber per month.

[66]This correlation is .55, indicating that larger systems have been competing for more years.

between competition and system size, we tried adding a variable which is equal to RSS for franchises that were included in the B and C samples and zero for those that were not. Unlike the system size interactions described above, this variable had a coefficient that did not have a very severe multicollearity problem. This coefficient, which can be treated as an estimate of the effect of system size on the competitive differential, was not significantly different from zero, further casting doubt on the interaction between competition and system size.

Possible Simultaneous Equations Bias

Whenever a supply or demand equation is estimated independently of the other, there is often a concern that what is being estimated is really a combination of both supply and demand factors. This is known as simultaneous equations bias. There are 2 ways this possible problem can be eliminated from the regression estimates. The easier, and the one used here, is to replace households subscribing (quantity demanded) in the equation with households passed (quantity supplied). The other would be to use a simultaneous equations estimation technique such as two-stage least squares. This technique allows for the interaction between supply and demand by introducing some extra variables that only affect demand. This would normally be a slightly preferable approach because the effect of the number of households on rates probably results primarily from the spreading of fixed costs, which is determined by the number of households actually subscribing, not the number of households passed. However, because of the way in which the number of subscribers enters the equation as a reciprocal, this approach yields an intractable functional form. Because the number of households passed is highly correlated with the number of subscribers, replacing RSS with RHP, the reciprocal of households passed in the system, will result in an estimate that is close to what could be achieved using a two-stage least squares approach.

Table A-2 shows the estimates that result from this approach. A comparison of the regression results using this approach with the ordinary least squares results of Table A-1 shows that, except for the coefficient of system size, the results are very similar. This indicates that there is no significant simultaneous equations bias in our original estimates.

Use of the Benchmark Equation in the Going-Forward Methodology

Our going-forward methodology permits cable operators

to recover external costs, to adjust non-external costs for inflation, and to adjust non-external costs by a specified amount per channel when the total number of regulated channels changes. Non-external costs are also adjusted on a tier basis when cable operators restructure tiers. This subsection explains how these adjustments were calculated, based on our benchmark equation.

When a cable operator increases the number of regulated channels offered, it may recover additional non-external costs. When a cable operator decreases the number of regulated channels offered, the amount of non-external costs that it may recover decreases. When a cable operator moves channels from one tier to another, the amount of non-external costs that it may recover per tier changes. In order to calculate these changes in permitted non-external costs, cable operators must utilize the table below. The entries in the table, which are based on our benchmark equation, indicate the amounts, in cents per channel per subscriber per month, by which cable operators will adjust their non-external costs.

When the total number of regulated channels changes, the cable operator will calculate the average of the old and new total numbers of regulated channels and consult this table to find the applicable per channel adjustment factor. The total permitted adjustment is the product of the per channel adjustment factor and the change in total regulated channels. It is positive if the number of regulated channels has increased and negative if the total number of regulated channels has decreased. The change in allowed non-external costs per tier is equal to the change in the number of channels on the tier (positive for increases and negative for decreases) multiplied by the per channel adjustment factor.

If the operator is merely restructuring tiers and there is no change in the total number of regulated channels, then the operator would find its total number of regulated channels in the table and note the corresponding per channel adjustment factor. Then, for tiers losing channels, the allowed non-external costs would decline by the adjustment factor multiplied by the number of channels removed from the tier. For tiers gaining channels, the allowed non-external costs would increase by the adjustment factor multiplied by the number of channels added to the tier.

We have based the non-external cost recovery formula on our benchmark rate equation. The benchmark equation shows how average revenue per subscriber changes as the number of regulated channels offered changes. A change in the number of regulated channels will clearly affect non-external costs

and may affect programming costs as well. The total number of regulated channels appears in two variables of the equation. One is the reciprocal of total regulated channels, which has a negative coefficient. The other is the ratio of nonbroadcast channels on regulated tiers to total regulated channels, which has a positive coefficient.

Intuition suggests that the non-external costs of adding a channel are the same for broadcast and nonbroadcast channels. However, adding a nonbroadcast channel probably adds more to programming cost than does adding a broadcast channel. (Must carry stations, for example, have no programming cost associated with them.) This leads us to conclude that the ratio of nonbroadcast channels variable primarily reflects changes in programming costs and the total channels variable primarily reflects changes in non-external costs. Suppose, however, that a cable system added a single broadcast channel with no associated change in programming costs. The value of the ratio of nonbroadcast channels variable would fall, reducing its contribution to average revenue per subscriber, even though programming costs did not change. The value of the reciprocal of total channels variable would also fall. Given the negative sign on its coefficient, this increases its contribution to average revenue per subscriber. That increase must include not only increased non-external costs but some component to counterbalance the change in the ratio of nonbroadcast channels variable.

These considerations lead us to vary only the value of the reciprocal of total channels variable when we calculate the impact of channel changes, setting the variables in the equation other than the reciprocal of average total channels variable equal to their means for our noncompetitive sample of cable systems. Because the reciprocal of total channels variable likely includes some of the programming cost effect when nonbroadcast channels are added, we considered "backing out" a programming cost component from the permitted cost increases generated by our benchmark formula. However, it is impossible to determine how much of programming costs might be captured by this variable. Moreover, we have no good data on programming costs as a share of total costs.[67] These considerations, plus our desire to avoid errors that might generate excessively low per channel adjustment factors, led us to refrain from reducing the channel

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[67] A submission from Continental Cable suggests that programming costs (pay plus basic) are 15.7% of total costs. An investment research report from Goldman Sachs estimates, for a hypothetical cable system, that basic programming costs would be 18.3% of basic revenues.

adjustment factors generated by the benchmark equation in order to remove a programming cost component from them.

To calculate the per channel adjustment factors in the table, we substituted mean values from our non-competitive sample into the benchmark equation for all variables other than the reciprocal of total regulated channels. Because the competitive dummy variables take on the value of zero in the noncompetitive sample, this means that we did not reduce the predicted average revenue per subscriber by our 17 percent competitive differential. The distinction is important because our procedure generates percentage changes in average revenue per subscriber as total regulated channels change. The magnitude of the change depends on the base value of revenue per subscriber. This magnitude is higher than it would be if we had chosen to deduct the competitive differential first. Our procedure here guards against excessively low channel adjustment factors and may be rationalized by noting that our benchmark equation generates changes in revenue per subscriber that were sufficient to make noncompetitive cable systems willing to increase the number of channels offered.

Using the relation between average revenue per subscriber and average total channels described in the previous paragraph, we calculated the change in average revenue per subscriber for a large number of one and two channel increments and associated those changes with the midpoint of the increment. For example, the change from 10 to 11 channels is associated with 10.5 channels. The change from 10 to 12 channels (divided by two) is associated with 11 channels, etc. The cable systems in our noncompetitive sample had channel capacities ranging from seven to 70. We therefore performed this exercise over a range (six to 71 channels) large enough to generate adjustment factors for seven to 70 channels. The portions of that range with identical cost changes are grouped together in the table.[68]

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[68] Our dependent variable is average revenue per subscriber, averaged over the various service tiers that the system offers. Hence, our procedure yields changes in allowed network costs per subscriber, assuming that all subscribers are assessed the additional costs. This is an appropriate assumption when the channel change is in the basic tier, since all subscribers get basic service. However, all subscribers do not subscribe to other tiers. Our survey shows that 89% subscribe to tier 2 and 85% to tier 3. To allow the cable operator to recover all the network costs to which it is entitled, it would be necessary to inflate the per channel adjustment factor by the reciprocal of the relevant tier's penetration of basic

The calculated cost changes are largest for small numbers of channels, reflecting the fact that our benchmark curve drops steeply at those channel levels and then flattens out substantially at higher channel levels. Low channel capacity systems are likely to have different, perhaps significantly different, characteristics than the average for the entire sample. Using sample averages could inflate the adjustment factors for those channel levels. Therefore, we made a separate calculation for the seven to 20 channels region, setting the variables in the equation other than the reciprocal of average total channels equal to their means for the subsample of noncompetitive systems with 20 or fewer channels. The figures in the table for seven to 20 channels are calculated in this fashion. For the range from 21.5 to 70 channels, the figures in the table are calculated using mean values for the entire noncompetitive sample as described above.

We note that the number of subscribers to systems in the seven to 20 channels range is relatively small and that most of these systems are likely to be small systems, for which we plan to do more detailed cost studies. Hence, it is likely that we will have more detailed information on costs of systems in this channel range before many of those systems would have occasion to use this per channel adjustment table.

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subscribers. Pending receipt of further information on how subscribership varies by tier, we have decided not to differentiate among tiers in application of the per channel adjustment factors.

Table A-1

Regression Results

Variable	Coefficient
Low Penetration Dummy (A1)	-.010 (.016)
Overbuild Overlap (OVL)	-.174 (.033)
Municipal Dummy (C)	-.231 (.050)
MSO Dummy (MSO)	.070 (.030)
Log of MSO Size (LMS)	.0097 (.0042)
Reciprocal of System Subscribers (RSS)	8.14 (1.60)
Reciprocal of Average Total Channels (RTC)	-1.45 (.61)
Proportion of Non-Broadcast Channels (PNB)	.253 (.079)
Proportion of Additional Outlets (PAO)	.103 (.026)
Proportion of Remotes (PRM)	.172 (.031)
Proportion of Tier 2 Subscribers (PT2)	.057 (.019)
Proportion of Tier Changes (PTC)	.353 (.111)
Log of Median Income (LIN)	.069 (.021)
Intercept	2.04 (.23)
R Square	.469
A1 impact	-.010
OVL impact	-.160
C impact	-.206
OVL + C impact	-.366
MSO impact	.073
PNB impact	.288
PAO impact	.109
PRM impact	.187
PT2 impact	.058
PTC impact	.424

Note: Numbers in parentheses are standard errors.

Table A-2

Estimates Eliminating Possible Simultaneous Equations Bias

Variable	Coefficient
Low Penetration Dummy (A1)	.009 (.016)
Overbuild Overlap (OVL)	-.174 (.033)
Municipal Dummy (C)	-.217 (.050)
MSO Dummy (MSO)	.075 (.030)
Log of MSO Size (LMS)	.0108 (.0042)
Reciprocal of System Households Passed (RHP)	21.42 (5.19)
Reciprocal of Average Total Channels (RTC)	-1.53 (.65)
Proportion of Non-Broadcast Channels (PNB)	.243 (.079)
Proportion of Additional Outlets (PAO)	.109 (.027)
Proportion of Remotes (PRM)	.171 (.032)
Proportion of Tier 2 Subscribers (PT2)	.054 (.019)
Proportion of Tier Changes (PTC)	.362 (.112)
Log of Median Income (LIN)	.070 (.021)
Intercept	2.03 (.23)
R Square	.458
A1 impact	.009
OVL impact	-.159
C impact	-.195
OVL + C impact	-.354
MSO impact	.078
PNB impact	.275
PAO impact	.115
PRM impact	.186
PT2 impact	.056
PTC impact	.436

Note: Numbers in parentheses are standard errors.

Table A-3

Adjustment Factors for Calculating Changes in Allowed Network Costs

Average Number of Channels	Per-Channel Adjustment Factor	Average Number of Channels	Per-Channel Adjustment Factor
7	$0.52	14	0.14
7.5	0.45	14.5	0.13
8	0.40	15-15.5	0.12
8.5	0.36	16	0.11
9	0.33	16.5-17	0.10
9.5	0.29	17.5-18	0.09
10	0.27	18.5-19	0.08
10.5	0.24	19.5-21.5	0.07
11	0.22	22-23.5	0.06
11.5	0.20	24-26	0.05
12	0.19	26.5-29.5	0.04
12.5	0.17	30-35.5	0.03
13	0.16	36-46	0.02
13.5	0.15	46.5 and up	0.01

February 22, 1994

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Implementation of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation (Fourth Order on Reconsideration, Fourth Report and Order)

With today's actions, the Commission revises its cable rate regulations by modifying the benchmark methodology, which serves as the primary approach for regulating cable service rates. In a separate rulemaking, the Commission establishes requirements to govern cost-of-service showings to justify rates above the levels determined by the benchmark approach.

The Commission's decision affirms a benchmark methodology and establishes a new competitive differential at 17% relative to September 1992 rate levels to guide rate reductions. Accordingly, the revised rules will require systems to reduce rates by 17% from their September 1992 level, or to the new benchmark, whichever is less. Once systems make their necessary reductions to comply with the new benchmark mechanism, they are permitted to add external costs and to apply a "going forward" adjustments for additional channels or system upgrades. Systems that have reduced rates by 17% (i.e., a prior 10% adjustment under the old benchmark and an additional 7% under the new benchmark), also may make adjustments for inflation.

In addition, these revised rules will initiate cost studies to verify cost differences among cable operators in comparison to the competitive differential. Systems that are required to reduce their rate by an amount less than the full 17% competitive differential -- as well as systems with rates below the new benchmark level that are not required to make any immediate reductions -- will be required to engage in future rate actions in accord with the results of the cost studies. As further elements of the cable rate regulation package, the Commission establishes (1) a mechanism to allow "going forward" adjustments for additional channels and system upgrades, and (2) a standard for targeted rate relief, as well as provisions for administrative relief, to small operators.

During this proceeding, I have consistently stated that the Commission must implement rate regulations in an orderly and effective manner in order to maintain the integrity of our regulatory process, to avoid creating potential unintended consequences, and to minimize false expectations among the consumer public.[69] I have also stated that the Commission's rate

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[69] See Order in MM Docket No. 92-266, FCC 93-372, released July 27, 1993, 58 FR 41042 (Concurring in Part and Dissenting in Part Statement of Commissioner Andrew C. Barrett). See also First Order on Reconsideration in MM Docket No. 92-266, FCC 93-248, released August 27, 1993, 58

regulation mechanisms must (1) incorporate measures of flexibility in order to balance the concerns of the industry, consumers, and franchising authorities, and (2) minimize the uncertainty that has resulted from the cable rate regulation proceeding so that consumers and the industry may develop realistic expectations and business plans, respectively.[70]

I write separately today in order to emphasize that my decision to support this rate regulation package is based on the measure of flexibility built into a benchmark system of regulation, including several of the "going forward" and "cost-of-service" components. Given the lack of complete information on pricing and costs, and our relatively limited sample for competitive and noncompetitive pricing behavior, I believe that a revised benchmark approach exercises the necessary caution in recognizing the variety of cost structures and pricing practices throughout the cable industry. During the reconsideration process, the Commission has revised the benchmarks by correcting the data on competitive and noncompetitive systems as well as refining the statistical procedure for estimating the benchmarks. Therefore, I believe that the benchmark information, although arguably subject to certain shortcomings detailed in this proceeding's record, now forms a better foundation for other components of the rate regulation package, especially the "going forward" allowances for channel additions and upgrades.

Next, I believe that the other components in this rate regulation package -- including the "going forward" methodology, the presumptions established to guide decisions regarding "a la carte" practices, and the provisions for a measure of small system relief -- will provide necessary flexibility to allow operators to begin to develop future business plans and to add new programming services. With respect to the "going forward" mechanism, I believe that the allowance for actual programming costs may help to avoid unintended consequences for program services as a result of the revised rate regulations. The opportunity for a streamlined cost-of-service showing also will allow operators to account for new services through upgrades of their systems. In addition, I support today's effort to distinguish legitimate "a la carte" marketing practices for programming services from those practices that could constitute evasions of the Commission's rate regulations. In this regard, I believe that the presumptions regarding "a la carte" practices will enable the Commission to identify legitimate package offerings that increase realistic consumer choices and provide for a reasonable number of programming services at favorable rates. Finally, the Commission has provided for a measure of rate relief for small operators, which will allow certain small operators to make external cost and "going forward"

FR 46718 (Separate Statement of Commissioner Andrew C. Barrett); Testimony of Commissioner Andrew C. Barrett, Federal Communications Commission, Before the U.S. House of Representatives, Subcommittee on Telecommunications and Finance, (September 28, 1993).

[70] See Keynote Address by Commissioner Andrew C. Barrett, Federal Communications Commission, Prentice Hall Law & Business Cable Conference; June 28, 1993. See also Order in MM Docket No. 92-266, FCC 93-372, released July 27, 1993, 58 FR 41042 (Concurring in Part and Dissenting in Part Statement of Commissioner Andrew C. Barrett); Testimony of Commissioner Andrew C. Barrett, Federal Communications Commission, Before the U.S. House of Representatives, Subcommittee on Telecommunications and Finance, (September 28, 1993); Order, MM Docket No. 92-266, released February 8, 1994 (Separate Statement of Commissioner Andrew C. Barrett).

adjustments to rates regardless of where the rates of these systems fall relative to the benchmark. Nonetheless, I remain concerned that some small operators may find that further relief is necessary in order to avoid particular hardship, and I emphasize that the provision for additional hardship relief to certain small operators, as well as the streamlined cost-of-service mechanism, will become important recourse for small operators in such dire situations.[71]

The revised rules also will initiate a cost study to verify cost differences among cable operators in comparison to the competitive differential. I believe that this study will provide important information to guide the Commission's analysis of the differences among competitive and noncompetitive operators, as well as the operating distinctions that may exist among small, medium and large operators. I also believe that this detailed cost information will enable the Commission to evaluate the validity of many policy assumptions that have guided our efforts in this proceeding, and therefore, will help to identify whether further adjustments are necessary to these refined rate regulations. As a result, I believe that it is appropriate to postpone rate actions as applied to certain systems, especially to small systems and those systems with rates below the new benchmark level, and to base future rate actions for those systems upon the differential, if any, identified by results of the cost study. I especially am interested in the cable industry's full participation in this cost study in order to resolve a notable void in this proceeding's record. As a consequence, I believe that these studies must be completed as soon as possible before the end of 1994 in order to promote the certainty that will enable all operators to develop future business plans.

Based upon my own analysis, I believe that the new competitive differential of 17% as compared to the September 1992 rate levels represents the highest point of what I consider to be an acceptable range for this policy determination. I have previously asked questions regarding the proper procedure for calculating the differential between competitive and noncompetitive rates, especially concerning the effect of the statistical treatment for low penetration and municipal systems on the differential.[72] I am aware that the Commission's revised data and statistical procedures provide analytical support for a 17% differential by focusing primarily on the differences between noncompetitive systems and overbuild systems, while retaining a measured consideration of the low penetration and municipal systems in the competitive sample. Nonetheless, I remain concerned that a more cautious approach for developing a competitive differential would reflect the limited confidence that results from a relatively small sample size and a lack of cost data. Furthermore, I consistently have emphasized the need to consider the effect of the cable rate regulations on industry investment.[73] The freeze on cable revenues and the implementation of the benchmark mechanism have had a negative impact on the cable

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[71] The dire financial straits faced by many small operators are well documented in this proceeding, including a letter submitted by the U.S. Small Business Administration, January 27, 1994.

[72] See Rate Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266, FCC 93-177, released May 3, 1993, 58 Fed Reg 29736 (Separate Statement of Commissioner Andrew C. Barrett).

[73] See n. 2.

industry's revenues and kept rates from rising. For example, a recent study states that these actions "have already precipitated more than an estimated $2 billion direct loss of revenues and cash flow," while also citing "the complete foreclosure of growth avenues for cable TV programmers."[74] Therefore, I am concerned about the potential effects of the 17% competitive differential relative to the September 1992 rate level. However, I also believe that the entire cable rate regulation package, including our cost-of-service and "going forward" options, incorporates important elements of flexibility that will allow operators to adjust to the 17% differential, where necessary. For example, all systems are permitted to adjust rates for external costs and "going forward" factors. Systems above the benchmark, which are required to reduce their rates by the full competitive differential, are permitted to make adjustments for inflation as accrued between September 1992 and September 1993.

Additionally, I believe that the benefits of the"going forward" mechanism for many operators will occur through the streamlined cost-of-service process, which will be subject to further comments and refinements. Given that this process will affect the incentives for operators to invest toward future system developments and the carriage of new programming services, I am concerned that this streamlined cost showing serve as an important bridge between the benchmark mechanism and the requirements for a full cost-of service showing. The streamlined cost-of-service process will play a critical role within the rate regulation framework, especially through provisions for an incentive-based plan for upgrades and the opportunities to demonstrate separate allocations for improvements to existing regulated services.

With respect to the cost-of-service proceeding, I support various aspects of the Order that grant flexibility to operators with unique cost-based circumstances that justify rates above the new permitted benchmark level. Furthermore, the cost-of-service process includes a rate-of-return factor of 11.25% that is reasonable as compared to other regulated industries, especially after tax considerations are included. I believe that necessary flexibility in the cost-of-service process also occurs through the cost allocation mechanism, the procedure for determining the portion of excess acquisition costs that operators may recover, as well as the provisions for treatment of Subchapter S corporations. As a result, I believe that the range of factors considered in the cost-of-service process, including the option for hardship showing, will begin to mitigate some of the consequences for cable operators who may endure the most significant changes as a result of the new 17% competitive differential.

Finally, I believe that this decision must be viewed in light of the overall package of elements that affect the rate calculations as well as the rate adjustments and cost showings that will be allowed. Therefore, I encourage the industry to await the release of all final orders before assessing the effects of these decisions on their particular markets. In the end, my goal is to ensure that our decisions in this area are balanced and will permit continued investment to

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[74] See Study by Paul Kagan Associates, January 1994. The record in this proceeding underscores the difficulties created by cable rate regulation for many programmers, including certain programmers that have manifested subscriber increases, in part, by initially offering services at no cost. See Correspondence filed tin MM Docket No. 92-266 by Discovery Communications, February 1, 1994; E! Entertainment Television, February 14, 1994; and United Video, February 14, 1994.

enhance services to the public. These rulemakings on cable rate regulation have involved extremely complex analysis, and I acknowledge the outstanding dedication shown by our Commission staff, my colleagues, and their respective staffs.

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 94-40
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Sections of the	)	
Cable Television Consumer Protection and	)	
Competition Act of 1992:	)	
	)	
Rate Regulation	)	MM Docket No. 92-266
	)	
Buy-Through Prohibition	)	MM Docket No. 92-262

Third Order on Reconsideration

Adopted: February 22, 1994 Released: March 30, 1994

By the Commission: Commissioner Barrett issuing a statement.

TABLE OF CONTENTS

		Paragraph
	Introduction	1
I.	Competition Issues	2
	A. Definitions and Findings of Effective Competition	3
	1. Measurement of Subscribership	5
	2. Presumption of Availability -- Satellite-Delivered Services	8
	3. Program Comparability	11
	4. Seasonal Households and Subscribers	15
	B. Geographically Uniform Rate Structure	18
II.	Tier Buy-Through Prohibition	25
III.	Procedural and Jurisdictional Issues	31
	A. Certification Process	31

1. Franchising Authority's Decision Not to Regulate 36
2. Franchise Fee Rebuttal Showing 39
3. Voluntary Withdrawal of Certification 44
4. Franchising Authority's Failure to Meet Certification Requirements 47
5. Revocation of Certification 51

B. Franchising Authority's Basic Rate Decision
1. Cost-of-Service Showings for Basic Tier Rates 58
2. Delegation of Authority and Form of Decision 62
3. Due Process Concerns 64
4. Appeals 67
5. Settlement of Rate Cases 70
6. Effective Date of Rate Increases 72
7. Proprietary Information 74
8. Forfeitures and Fines 80
9. Franchising Authority Discretion 81

C. FCC Form 393 (FCC Forms 1200/1205) Issues/Failure to File
1. Failure to File Rate Justification 82
2. Deficient Rate Justifications; Additional Information 86
3. Updating Rate Calculations 93
4. Computer-generated Forms 95

D. Refund Issues
1. Commission Authority to Allow Franchising Authority to Order Refunds on Basic Tier Rates 99
2. Refund Computations 103
3. Refunds as Affecting Franchise Fee Liability 105
4. Calculation of Refunds on Basic Rates 107
5. Calculation of Refunds on Cable Programming Service Complaints 110

E. Cable Programming Service Complaint Process
1. Effective Date of Cable Programming Service Regulation 118

IV. Provisions Applicable to Cable Service Generally 122

A. Negative Option Billing Practices 123
B. Prevention of Evasions 132
C. Grandfathering of Rate Agreements 137
D. Subscriber Bill Itemization
1. Special Taxes 139

2. Advertising of Rates 142
3. Itemization of "Franchise Related" Costs 144
E. Effective Date 145

V. Equipment and Installation 147

A. Promotions 148
B. Seasonal Property Related Charges 151
C. Sale of Home Wiring 154
D. Time Lag 157

VI. Ordering Clauses 159

Appendices

INTRODUCTION

1. In recent months, this Commission has taken a number of steps to implement the rate regulation provision of the Cable Consumer Protection and Competition Act of 1992 ("1992 Cable Act," "Cable Act," or "Act").[1] In May 1993, we issued our Report and Order and Further Notice of Proposed Rule Making in MM Docket No. 92-266 ("Rate Order" and "First Further Notice"), 8 FCC Rcd 5631 (1993), which: 1) developed a process for identifying those situations where effective competition exists, and rate regulation is thus precluded; 2) established the boundaries between federal responsibilities, on the one hand, and state and local responsibilities, on the other hand; and 3) developed procedural and substantive rules to govern the regulation of basic service tier rates, regulated upper tier rates, equipment rates, and rates for leased access channels. In this Third Order on Reconsideration, we dispose principally of those issues raised on reconsideration of the Rate Order or encountered in our initial implementation of rate regulation that do not relate to the calculation of rates. Specifically, we further clarify the definition of "effective competition" in Section 623(l) of the Act, 47 U.S.C. 543(l); affirm our rules regarding tier buy-through prohibitions; address procedural and jurisdictional issues pertaining to the regulatory process, including certification, basic rate decisions, and refund issues; clarify our rules governing evasions, grandfathering of rate agreements, subscriber bill itemization and advertising of rates; consider remaining issues regarding equipment and installation; and clarify several points with regard to FCC Form 393 (the benchmark calculation form) and FCC Forms 1200

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

and 1205 (the new calculation forms).[2] Two companion Orders[3] dispose of reconsideration issues involving calculation of rates, provide special regulatory relief for small systems, adopt additional regulations to govern rate increases, and adopt interim cost-of-service rules. Issues raised on reconsideration of the leased access provisions adopted in the Rate Order[4] will be considered in a future order.

I. COMPETITION ISSUES

2. In considering the legislation that was to become the 1992 Cable Act, Congress noted that "[w]hile cable passes more than 95 percent of U.S. television households, and presently more than 60 percent of households subscribe to cable, cable's competitors service, in the aggregate, fewer than 5 percent of American households."[5] Congress further found that without the presence of other multichannel video programming distributors, a cable system faces no local competition, which results in undue market power for the cable operator as compared to that of consumers and video programmers.[6] Our rate regulations are designed to set "reasonable" rates, which we construe to be rates that would be charged by cable operators subject to effective competition.[7]

A. Definitions and Findings of Effective Competition

3. Under the 1992 Cable Act, rate regulation applies only to cable systems that are not subject to "effective competition" as defined in that Act. 47 U.S.C. § 543(a)(2). Section 623(l)(1) of the Act further provides that "effective competition" exists if one of three tests is met:

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[2] FCC Form 1200: "Setting Maximum Initial Permitted Rates for Regulated Cable Services Pursuant to Rules Adopted February 22, 1994--First Time Filers Form;" FCC Form 1205: "Determining Current Equipment and Installation Rates--Equipment Form."

[3] Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266, FCC 94-38, adopted February 22, 1994 ("Second Order on Reconsideration"); Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 93-215, FCC 94-39, adopted February 22, 1994.

[4] Rate Order at 5933-5964.

[5] House Committee on Energy and Commerce, H.R. Rep. No. 628, 102d Cong., 2d Sess. ("House Report") at 30 (1992).

[6] Pub. L. No. 102-385, § 2(a)(2).

[7] Second Order on Reconsideration, *supra* at para. 48.

(A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;

(B) . . . the franchise area is (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50% of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15% of the households in the franchise area; or

(C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.

47 U.S.C. § 543(l)(1).

4. Our First Order on Reconsideration[8] ("First Rates Reconsideration") addressed issues concerning the first of these statutory tests (*i.e.*, the "low penetration" systems listed in Section 623(l)(1)(A)) and procedures for demonstrating the presence of "effective competition" as defined by the Act. We here consider several remaining issues, most of which involve situations arising under the second statutory test, in which a second cable operator, or other multichannel video provider, actually competes with the subject cable operator.

5. Measurement of Subscribership. As stated above, under the second statutory test, a cable operator is not subject to rate regulation if a competing multichannel distributor serves at least 50% of the households in the subject system's franchise area and more than 15% of the subscribers in the franchise area subscribe to the competitive service (or services). 47 U.S.C. § 543(l)(1)(B). We previously adopted various rules to implement this test. One of these rules provides that, in calculating whether 15% or more of the households in a franchise area subscribe to all but the largest multichannel video programming distributor, we shall consider the subscribership of competing multichannel distributors on a cumulative basis. However, only the subscribers of those multichannel distributors that offer programming to at least 50 percent of the households in the franchise area shall be included in this cumulative measurement. 47 C.F.R. § 76.905(f); Rate Order, *supra* at 5665.

6. Time Warner argues that the statute does not allow us to include only those multichannel distributors that offer programming to at least 50% of the households in the franchise area. It contends that the two tests in subsections 543(l)(1)(B)(i) and (ii) may be met independently, *i.e.*, that all competitors' subscribers should be counted, however small

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[8] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, FCC 93-428 (released Aug. 27, 1993), 58 Fed. Reg. 46,718 (Sept. 2, 1993).

their areas of service, if any competitor reaches 50% of the households in the franchise area. Time Warner also argues that its interpretation addresses the Commission's concern with eliminating rate regulation when only "select portions of a franchise area might receive a choice of several multichannel video programming distributors, while the remainder of the franchise area is left without such alternatives." See Rate Order, *supra* at 5663. It contends that the 50% reach requirement assures the presence of a competitive alternative for most of the franchisee's customers.

7. Time Warner has not persuaded us to change our interpretation. As we stated in the Rate Order, we interpret Section 623(l)(1)(B) as providing that effective competition exists only where competitive multichannel service is a viable alternative in a significant portion of the franchise area at issue. Id. at 5665. This interpretation ensures that a cable operator is not subject to rate regulation where a substantial number of subscribers have alternative competitive choices, so that the remaining subscribers have the benefit of the price discipline imposed by the cable operator's need to meet competition in a significant portion of its market. The contrary interpretation advanced by Time Warner would permit a cable company to escape rate regulation even if it faced only a single, ineffective competitor in a majority of its territory, along with a variety of niche competitors to whom it would not necessarily be compelled to provide a competitive response and to whom few of its customers could turn for a competitive alternative. Moreover, in light of the almost universal "offering" of multichannel satellite service, the Time Warner proposal would make the 15% actual subscribership test the sole determinative factor in almost all situations, rendering Section 623(l)(2)(B)(i) superfluous. Thus, we affirm our original interpretation of the test adopted in the Rate Order.

8. Presumption of Availability -- Satellite-Delivered Services. The second statutory test for effective competition requires, in part, that at least two unaffiliated multichannel distributors each offer comparable programming to at least 50% of the households in a franchise area. 47 U.S.C. § 543(l)(1)(B). We previously concluded that multichannel programming is "offered" if it is both technically available (*i.e.*, it can be delivered to a household with only minimal additional investment by the multichannel distributor) and actually available (*i.e.*, potential subscribers must be aware of its availability from marketing efforts). 47 C.F.R. § 76.905(e). Furthermore, as discussed below, the Rate Order stated that multichannel video programming distribution service received from satellites via satellite master antenna television service ("SMATV") or television receive-only earth station ("TVRO") reception is technically available nationwide in all franchise areas that do not, by regulation, restrict the use of home satellite dishes. Rate Order, *supra* at 5659, 60.

9. Three parties, the National Association of Telecommunications Officers and Advisors (NATOA), King County, and Bellsouth Telecommunications, seek elimination of the presumption that satellite service is available, as a technical matter, on a nationwide basis where the use of satellite dishes is not restricted by, for example, local zoning laws. Noting that SMATV service is available only in buildings with multiple dwelling units, they contend that it is incorrect to presume that SMATV service is available to 50% of the households in

all franchise areas because there may not be enough multiple dwelling units in a specific franchise area to account for 50% of its households.

10. These parties appear to misunderstand the analysis set forth in the Rate Order. There is no dispute that multichannel video programming is available throughout the United States from satellite stations (except where there are reception obstacles such as zoning restrictions). Because subscription to satellite service is accomplished alternatively through either SMATV or TVRO facilities, we permitted both to be included toward meeting the 15 percent subscription test, even though SMATV service, taken alone, might not be available to 50% of the households in a franchise area. We clearly recognized that SMATV service is generally available only in multiple dwelling units and were not suggesting, contrary to petitioners' filings, that SMATV service by itself might in some theoretical sense be capable of serving the entire nation. Rather, we concluded, and continue to believe, that satellite service is generally available from one or the other of these complementary sources, and it is reasonable to measure actual acceptance of satellite services in any area by collectively counting both SMATV and TVRO subscribership toward the 15 percent test. The fact that it may be the building owner or the manager or the residents of a building collectively who select SMATV service, rather than individual households, does not mean that households in multiple dwelling units do not have a competitive option to cable service. Moreover, where satellite-delivered services achieve a penetration rate of 15%, or are sufficient to contribute meaningfully to a 15% overall penetration rate for competitors, the cable operator presumably will respond to that competition with a competitive offering of its own with no less vigor than if that level of competition came from a terrestrially-based medium.

11. Program Comparability. The Rate Order also adopted a rule defining when a competing multichannel distributor is offering "comparable programming" under the second statutory test for effective competition. Id. at 5666, 67. The rule provides that "[i]n order to offer comparable programming . . . a competing multichannel video programming distributor must offer at least 12 channels of video programming, including at least one channel of nonbroadcast service programming." 47 C.F.R. § 76.905(g).

12. NATOA argues that the failure to adopt an earlier Senate version of the second statutory test for effective competition, which was based *inter alia* on the presence of "a sufficient number of local television broadcast signals" in a franchise area,[9] indicates Congress's intent that broadcast stations not be taken into account in determining what constitutes comparable programming. NATOA thus concludes that our definition of "comparable programming" is inconsistent with this legislative intent that broadcast service programming cannot be considered at all when determining the presence of effective competition. There is no specific language in the Conference Report indicating why the Senate version was not adopted, and NATOA is merely speculating as to the meaning of the

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[9] Senate Committee on Commerce, Science and Transportation, S. Rep. No. 92, 102d Cong., 1st Sess. ("Senate Report") at 116 (1991).

omission of the Senate language from the final version. Moreover, NATOA's interpretation of the legislative intent is not supported by the plain meaning of subsection (i), which contains no language prohibiting the Commission from taking into account broadcast service programming in determining when competing multichannel distributors are offering "comparable programming." Indeed, we believe that the failure to include such a prohibition in subsection (i) may be more properly interpreted as an intent by Congress to give the Commission flexibility in crafting a definition of "comparable programming." Thus, contrary to NATOA's claim, Congress's apparent decision that over-the-air broadcast signals alone do not constitute "effective competition" does not prohibit us from taking account of broadcast stations delivered by cable.

13. NATOA also contends that a multichannel distributor offering 12 channels of video programming is not offering programming "comparable" to a cable system that provides, for example, 60 channels of programming. It suggests that the Commission should consider a multichannel distributor to be offering programming comparable to a local cable system only if there is a 20% or less difference in the number of channels of nonbroadcast programming offered by the distributors. This argument was specifically rejected in our Rate Order, and NATOA has offered no new argument. (*See* id. at 5666, 67, and n. 126.) While we recognize that a 12-channel video delivery system is not identical to a 60-channel system, we do not believe that actual channel parity is necessary to provide a competitive alternative. In fact, some disparity in the number of channels offered should lead to a greater price difference, which may enhance the choice presented to subscribers. In addition, as we noted in the Rate Order, any definition of "comparable programming" will be complemented by the 15% penetration requirement which will, in effect, measure subscribers' evaluation of the comparability of the program offering.

14. NATOA also questions the Commission's conclusion that our "definition of 'comparability' should ensure alternative service is competitively comparable to a minimum basic tier service that an incumbent cable operator could offer." Rate Order, *supra* at 5666. The petitioner contends that this is too narrow a reading of "comparable programming" or "effective competition" and that these terms should include entities that provide competition to the package of services offered by cable operators, and not just to the basic service tier of the incumbent cable operator. We do not agree. Since there is a wide variety in the number and types of channels that different cable systems offer, we believe that it is reasonable to take into account the minimum basic service tier in determining when competing multichannel distributors are offering programming comparable to that of a local cable system. Such an approach will ensure that competing multichannel distributors have at least the programming characteristics common to all cable systems. Accordingly, we will not change the definition of "comparable programming" adopted in the Rate Order.

15. Seasonal Households and Subscribers. The Rate Order defined the term "households" as follows: "[e]ach separately billed or billable customer will count as a household subscribing to or being offered video programming services. . . ." 47 C.F.R. § 76.905(c). In addition, individual units in multiple dwelling buildings are

counted as separate households even though they may not be separately billed. Id.

16. Higgins Lake Cable, Inc., a small cable system operator, reports that its subscribership fluctuates significantly during different seasons of the year, so that it may be a "low penetration system" within the meaning of Section 623(l)(1)(A), 47 U.S.C. 543(l)(1)(A), at some times but not others. It suggests that the Commission define the term "households" to include all dwelling units, whether they are seasonal or not, in determining whether a system is a low penetration system. Higgins Lake believes that such an approach would relieve operators of administrative burdens in determining the total number of households within their franchise areas that are occupied on a full-time as opposed to a seasonal basis.

17. The term "household" was defined for purposes of the 1990 Census as "all the persons who occupy a housing unit,"[10] while "housing units" was defined to include both occupied and vacant units. Thus, "housing units" reflect the total dwelling units in a community, while a count of "households" reflects only occupied units. As used in the Cable Act, we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units or even partial-year vacant units. In any event, to permit an operator to include dwelling units that are empty for a significant portion of the year in determining its penetration rate would eviscerate the validity of this measure as an indicator of the presence of effective competition. People who are not present cannot be presumed to be choosing local competitive alternatives. We believe that the best and most constant indicator of local viewers' choices is represented by the full-time residents of an area. Moreover, it is the full-time residents who are most affected by the determination whether their cable rates are subject to regulation. Consequently, the operator should measure its penetration rate of full-time subscribers as a percentage of full-time households, *i.e.*, by excluding housing units used for seasonal, occasional, or recreational use.[11] No party has demonstrated why this calculation should be a particular administrative

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[10] Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[11] We will use the U.S. Census Bureau definition for seasonal, recreational, and occasional use:

> These are vacant units used or intended for use only in certain seasonal or for weekend or other occasional use throughout the year. Seasonal units include those used for summer or winter sports or recreation, such as beach cottages and hunting cabins. Seasonal units may also include quarters for such workers as herders and loggers. Interval ownership units, sometimes called shared ownership or time-sharing condominiums, are also included here.

1990 Census of Housing, General Housing Characteristics, Maryland, at B-12.

burden, and we believe that it should be easily made from readily available information.[12]

B. Geographically Uniform Rate Structure.

18. The 1992 Cable Act requires cable operators to "have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system." 47 U.S.C. § 543(d). In the Rate Order, the Commission concluded that this provision was applicable only to regulated services in regulated markets. Rate Order, *supra* at 5896. The Commission then determined that the provision would be enforced on a franchise area by franchise area basis. Id. Finally, the Commission found that this provision did not prohibit all differences in rates between customers. Cable operators are not necessarily barred from distinguishing between seasonal and full-time subscribers and from offering promotional rates universally but for a limited time. Also, discounts for senior citizens or economically disadvantaged groups may be set. Additionally, nonpredatory bulk discounts to multiple dwelling units (MDUs) are permissible if offered on a uniform basis. Id. at 5897, 98.

19. A number of cable operators petition the Commission to allow negotiation of rates on a building-by-building basis and to clarify that the "competitive necessity" doctrine applies.[13] Booth American, for example, argues that this is necessary to maintain flexibility to compete with multichannel video providers that target particular MDUs. Time Warner asserts that pervasive competition from alternate service providers exists in communities with significant numbers of MDUs, and Comcast fears that the Commission's current approach virtually guarantees a loss in cable's market share, since cable operators are prevented from responding to competitors' individual bids to MDUs.

20. The Cable Act is unequivocal in requiring uniformity of rates within a franchise area. It states:

> A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its

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[12] For example, the U.S. Census Bureau's General Housing Characteristics Report for each state shows the number of units for local jurisdictions and the number of these units that are vacant due to "seasonal, recreational, or occasional use."

[13] Application of this doctrine would allow cable operators to offer a rate to a particular customer to meet the rate offered by a competitor. For a discussion of this doctrine in the Title II common carrier context, see, e.g., Memorandum Opinion and Order in CC Docket No. 88-471 (AT&T Communications, Transmittal No. 1215), 4 FCC Rcd 7712 (1988); Report and Order in CC Docket No. 79-246 (Private Line Rate Structure and Volume Discount Practices), 97 FCC 2d 923, 948 (1984).

cable system.[14]

This language does not limit the provision to any particular class or classes of subscribers. In accordance with the statutory mandate, the Rate Order also specifically noted the Commission's concern that bulk discounts not be abused to displace other multichannel video providers from MDUs, which have become important footholds for the establishment of competition to incumbent cable systems. Id. at 5898. As King County points out, cable operators are not prevented from meeting competition -- as long as the same rate structure is offered to all MDUs in the franchise area. Moreover, cable operators may offer different rates to MDUs of different sizes and may set rates based on the duration of the contract, provided that the operator can demonstrate that its cost savings vary with the size of the building and the duration of the contract, and as long as the same rate is offered to buildings of the same size and contracts of similar duration. Thus, bulk arrangements on a variable basis between MDUs of the same size and contractual duration, though currently allowed by some franchising authorities, are specifically prohibited by the Act.

21. Continental and TCI urge the Commission to grandfather cable operators' existing contracts with MDUs. Continental argues that if these contracts are not grandfathered, cable operators will be forced to breach them, and TCI contends that the rates in these contracts are already at competitive levels and thus need not be regulated.

22. We believe that the elimination of existing contracts would be unnecessarily disruptive to those subscribers receiving discounts, as well as to those cable companies offering the discounts. Thus, contracts between cable operators and MDUs entered into on or before April 1, 1993, in which the contract rate is lower than the permitted regulated rate, may remain in effect until their previously agreed-upon expiration date. To the extent the Rate Order may have been interpreted by private parties to supersede existing contracts, which were accordingly rewritten, the terms of such contracts may be reinstituted without violating Commission rules.

23. King County requests reconsideration of the Commission's decision to limit the geographic uniformity requirement to regulated services in regulated markets. Rate Order at 5896. The Commission reasoned that while Section 623(d) contained no limiting provisions, the general thrust of the Act's rate regulation provisions was to rely more on general legal prohibitions against anticompetitive behavior, and less on cable industry-specific regulation,

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[14] Communications Act of 1934, as amended, "Communications Act") § 623(d), 47 U.S.C. § 543(d). See Senate Report at 76. It is clear that Congress also intended to prevent a cable operator from charging a price in a particular MDU that is not a commercially viable price. This would not only require the operator's subscribers to subsidize its MDU customers, but would also unfairly eliminate the competitor's opportunity to engage competitively in the same business. Id.

as markets become more competitive. Id. King County contends that the Commission's interpretation would permit operators to subsidize low rates in one franchise area (or portion thereof) that faces competition by charging excessive rates in a noncompetitive franchise area, and insists that this is exactly what Congress intended to prevent.

24. On reconsideration, we conclude that the uniform rate structure requirements of Section 623(d), 47 U.S.C. § 543(d), should apply in all franchise areas, irrespective of the presence of "effective competition" as defined in the Act. The specific harms that the rate uniformity provision is intended to prevent -- charging different subscribers different rates with no economic justification and unfairly undercutting competitors' prices -- could occur in areas with head-to-head competition or low penetration sufficient to meet the Act's definition of "effective competition." This would not only permit the charging of noncompetitive rates to consumers that are unprotected by either rate regulation or competitive pressure on rates, but also stifle the expansion of existing, especially nascent, competition. As the Senate Report states: "This provision is intended to prevent cable operators from having different rate structures in different parts of one cable franchise ... [and] from dropping the rates in one portion of a franchise area to undercut a competitor temporarily."[15] The statutory language does not provide, and the Senate Report does not suggest, that the rate uniformity provision should be limited to franchise areas where "effective competition" is absent. For example, if a wireless cable operator served 60% of the homes passed by a cable system in a franchise area and achieved a 30% penetration rate, effective competition would be found. Under our current rule, the cable operator would be free to charge one price where the wireless cable signal reaches and a higher price where it does not. That could result in the subsidization of the cable operator's competitive responses to the wireless cable operator by the 40% of consumers who do not have a choice of competing operators. Accordingly, we will apply the uniform rate structure requirement to all franchise areas, whether or not the cable system is exempted from rate regulation by the "effective competition" provisions of Section 623(b).

II. TIER BUY-THROUGH PROHIBITION

25. The tier buy-through prohibition of the 1992 Cable Act prohibits cable operators from requiring subscribers to purchase a particular service tier, other than the basic service tier, in order to obtain access to video programming offered on a per-channel or per-program basis. 47 U.S.C. § 543(b)(8). An exception is made for cable operators that are not technically capable of complying with this requirement during the next ten years. Id. In a

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[15] Senate Report at 76. This language also indicates that the term "geographic area" was intended to refer to "franchise area" and not, as King County argues, a broader geographic area. See Rate Order, *supra*, at 5896, where the Commission considered, and rejected, arguments to define "geographic area" more broadly than a franchise area.

previous decision, we adopted an implementing rule that (1) prohibits discrimination between subscribers of the basic service tier and other subscribers with regard to rates charged for video programming offered on a per-channel or per-program basis; (2) forbids any retiering of channels or services intended to frustrate the purpose of the tier buy-through provision; and (3) defines when cable systems are not technically capable of complying with this requirement. Report and Order in MM Docket No. 92-262 ("Tier Buy-Through Order"), 8 FCC Rcd 2274 (1993); 47 C.F.R. § 76.921.[16] At that time, we also determined that all cable systems are subject to the tier buy-through prohibition and our implementing rules.[17] Id. at note 32.

26. Prime Cable, the operator of a cable system that is not subject to rate regulation because it has a low penetration rate, requests that the Commission reconsider its determination that the tier buy-through prohibition applies to all cable systems, including those subject to rate regulation. Petitioner argues that the placement of the buy-through prohibition within Section 623(b) of the 1992 Cable Act, 47 U.S.C. 543(b), limits the provision's scope to cable systems that are regulated since Section 623(b) generally relates to basic tier regulation. The petitioner contends that if Congress had intended a broader application of the buy-through prohibition, it would have placed the provision in a different section of the statute.

27. After considering the petitioner's arguments, we continue to believe that the tier buy-through provision applies to all cable systems, regardless of whether they are subject to rate regulation. The language of the provision clearly states, without limitation or qualification, that "a cable operator may not require the subscription to any tier other than the basic service tier . . . as a condition of access to video programming offered on a per channel or per program basis." 47 U.S.C. § 543(b)(8). Congress could have easily limited this provision to regulated systems by expressly doing so.

28. This interpretation is necessary to fulfill the purpose of this provision and the general purposes of the 1992 Cable Act. As explained in the legislative history, the purpose

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[16] This rule was originally adopted as Section 76.900, but was renumbered and modified in the Rate Order, *supra*.

[17] After the release of the Tier Buy-Through Order, the Commission clarified in the Rate Order that the tier buy-through provision of the 1992 Cable Act "only precludes operators from conditioning access to programming offered on a per-channel or per-program basis on purchasing intermediate tiers." Rate Order, *supra* at 5903, n. 435. Therefore, the provision does not prohibit operators from requiring the purchase of an intermediate tier of cable programming services in order to obtain access to another tier of cable programming services. Id. See also 47 C.F.R. § 76.921(a). No petitions for reconsideration were filed in the rate proceeding regarding this clarification.

of the tier buy-through provision "is to increase the options for consumers who do not wish to purchase upper cable tiers but who do wish to subscribe to premium or pay-per-view programs."[18] Other parts of the legislative history indicate that one of the purposes of the Act is to encourage a greater unbundling of programming offerings and greater choice for subscribers.[19] For example, in the context of defining the term "cable programming services," the Senate Report stated that "[t]hrough unbundling, subscribers have greater assurance that they are choosing only those program services they wish to see and are not paying for programs they do not desire."[20] Applying the tier buy-through provision to all cable systems will accomplish this purpose more effectively than limiting the provision to cable systems subject to rate regulation. It is not apparent that cable systems exempted from rate regulation, *i.e.*, those facing "effective competition" as defined for this purpose by the statute, are any more likely to provide buy-through capability of their own volition than those whose rates are regulated. Accordingly, to provide all cable subscribers with the maximum possible flexibility in paying for those programs they desire, it is necessary to apply the tier buy-through provision to all cable systems.

29. Prime Cable has not set forth convincing arguments for applying the tier buy-through provision only to rate regulated systems. The placement of the tier buy-through provision in Section 623(b) of the Communications Act does not suggest limited applicability. The tier buy-through provision is in a stand-alone paragraph of Section 623(b) that, unlike many of the other paragraphs of that section, does not deal with rate regulation. Senate Report at 77. We have also concluded in this Order that another paragraph of Section 623 that similarly lacks any limiting or qualifying language -- the geographically uniform rate structure provision -- applies to all cable systems. See para. 24, *supra*. Likewise, the provisions regarding negative option billing, also found in Section 623 of the Act, apply to all cable systems without regard to the presence or absence of effective competition. See discussion at para. 127, *infra*.[21] Additionally, like the buy-through provision, the requirement that all "must-carry" channels be included on the basic tier shares the same subsection (623(b)) with the rate regulations, yet the must-carry requirement is also

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[18] 138 Cong. Rec. S14608 (September 22, 1992) (Statement of Sen. Inouye).

[19] Senate Report at 77.

[20] Id.

[21] The Conference Report indicates Congress's intention that "the language adopted by the conference ensures that cable operators will not be able to charge customers for tier or packages of programming services or equipment that they do not affirmatively request as well as individually-priced programs or channels." House Committee on Energy and Commerce, H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. ("Conference Report") at 65 (1992). This language establishes that Congress did not intend to extend the limitations on rate regulation to the non-rate provisions of Section 623.

applicable to all cable systems.[22]

30. Prime Cable's reference to a passage in the House Report explaining that the buy-through provision "prohibits cable operators from requiring subscribers to purchase any tier of service other than the regulated basic tier before being permitted to purchase programming offered on a per-channel or per-program basis"[23] is not persuasive. Prime Cable contends that the House Report would not have used the term "regulated" unless the tier buy-through provision was intended to apply only in a rate regulated environment. We believe, however, that the legislative history was using the term descriptively in reference to basic tier service, which in most instances is subject to rate regulation, unlike per-channel or per-program offerings, which are not subject to regulation. We thus do not believe that a single reference to "the regulated basic tier" in the House Report should be read to add a limiting regulatory gloss to the plain language of the tier buy-through provision, which on its face refers to "cable operator" without limitation or qualification as to whether that operator's rates are subject to regulation.

III. PROCEDURAL AND JURISDICTIONAL ISSUES

A. Certification Process.

31. The 1992 Cable Act provides that primary responsibility for regulation of rates for basic tier service lies with local franchising authorities, and that the Commission will regulate the rates for all other regulated tiers of programming service. 47 U.S.C. § 543(a)(2). All of our procedural rules and policies that implement rate regulation are designed to meet the twin goals of: 1) observing the prerogative and authority of local franchising authorities to determine whether to regulate basic rates and 2) protecting subscribers from excessive cable rates. 47 U.S.C. § 543(b)(1).

32. In the April 1993 Rate Order, the Commission stated that the franchising authority must take the initiative to either regulate rates or seek the Commission's intervention and have us regulate basic tier rates, with the obvious implication that basic tier rates deemed acceptable by local authorities would not be regulated. We stated that we would not seek to regulate basic tier rates unless requested, or unless a franchising authority sought to regulate rates but was prevented from doing so because of a legal or regulatory obstacle. In devising this delineation of responsibilities, we declared that if this regulatory scheme failed to protect subscribers, we would reconsider its efficacy and, if appropriate, adopt another implementation scheme. Id. at 5640.

33. Before a franchising authority may regulate basic tier rates, it must first seek

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[22] 47 C.F.R. § 76.56(d); Report and Order in MM Docket No. 92-256, 8 FCC Rcd 2965, 2974.

[23] House Report at 85 (emphasis added).

certification of its capability to regulate, adopt appropriate regulations, and then notify the cable operator that its rates are to be regulated. To qualify for certification, the franchising authority must possess the legal authority to adopt, and the personnel to administer, appropriate rate regulations. 47 U.S.C. § 543(a)(3)(B). We provided that where certification is denied or revoked, we would exercise the franchising authority's regulatory jurisdiction until the franchising authority became certified or recertified. Id. at 5677, 5699.

34. On reconsideration, petitioners have challenged four different aspects of the certification process: 1) the Commission's decision not to assume jurisdiction over basic rates where the franchising authority chooses not to seek certification; 2) the Commission's automatic exercise of jurisdiction over basic rates upon denial of a franchising authority's request for certification; 3) the Commission's standards for revocation of certifications; and 4) the Commission's requirement that franchising authorities seeking to have the Commission regulate basic rates show that their franchise fees are insufficient to fund rate regulation at the local level. Each of these topics is taken up individually below.

35. At the outset, however, it is important to reiterate our firm resolve to effectively implement the Act's provisions to protect subscribers from unreasonable cable rates. It appears that many franchising authorities have not yet filed for certification to regulate rates. We believe that franchising authorities (i) are either uninformed (or misinformed) as to the simplicity and implications of seeking certification, (ii) have decided to wait until other franchising authorities have tested the water or shown them the way, or (iii) are awaiting the Commission's decision on reconsideration of the rate regulations before commencing regulation of basic rates. We intend to undertake a robust and widespread educational effort, and also expect that publicity about the regulatory results achieved by those franchising authorities that are in the forefront of rate regulation will greatly increase the number of authorities seeking certification to regulate rates. Given this expectation, we are reluctant to infringe on local authorities' regulatory prerogatives at this time. However, if our expectations are not promptly borne out, and too many subscribers are deprived of the benefits of the 1992 Cable Act due to inaction by their franchising authorities, we will revisit our stance on any and all of the certification-related issues discussed here.

36. Franchising Authority's Decision Not to Regulate. In the Rate Order, we analyzed carefully whether we should assert the authority to regulate basic rates when a franchising authority had not sought certification. We emphasized that Congress had vested in local franchising authorities the primary authority to regulate basic rates and that we therefore did not want to override a locality's decision not to regulate rates. We concluded that we would not assume jurisdiction in cases where a franchising authority does not apply for certification or directly request that the Commission regulate rates. Rate Order, *supra* at 5676.

37. Bell Atlantic and Bellsouth Telecommunications argue that by declining to regulate basic cable rates where authorities do not regulate these rates themselves, the Commission has created a regulatory "no-man's land" in which basic rates are free of any regulation at all. The petitioners argue that creating such a regulatory vacuum is contrary to a stated purpose of the Act, to ensure that rates for basic service are reasonable. In opposition,

Viacom argues that franchising authorities are best able to determine whether to regulate basic service rates.

38. These arguments were squarely before us when we made our determination in the Rate Order and, for the time being, we will continue to decline to assert jurisdiction over basic cable service where franchising authorities do not choose to regulate rates themselves. The Act's regulatory scheme vests in franchising authorities the initial decision whether their communities' basic cable service rates should be regulated. Rate Order, *supra* at 5676. Any regulatory "no-man's land" will be created by the intentional action or inaction of the local franchising authority.[24] In any case where this may work to the detriment of subscribers, they can seek relief from their local authorities through the political processes available to them. However, as noted in paragraph 35, above, in the event that basic cable rates remain unregulated in a large number of communities , we will reexamine this issue.

39. Franchise Fee Rebuttal Showing. We stated in the Rate Order that we would presume that franchising authorities receiving franchise fees have the resources to regulate rates. A franchising authority seeking to have the Commission exercise jurisdiction over basic rates is thus required to rebut this presumption with evidence showing why the proceeds of the franchise fees it obtains cannot be used to cover the cost of rate regulation. Rate Order, *supra* at 5676. This showing must consist of a detailed explanation of the franchising authority's regulatory program that shows why funds are insufficient to cover basic rate regulation. Id. The Commission will assume jurisdiction only if it determines that the franchise fees cannot reasonably be expected to cover the present regulatory program and basic rate regulation. Id.

40. NATOA and King County argue that the franchising authorities should not have to justify their inability to regulate rates through a rebuttal showing based on franchise fee inadequacy. They argue that such a requirement would directly contradict Section 622(i) of the Communications Act, 47 U.S.C. 542(i), which prohibits federal agencies from regulating the use of funds derived from franchise fees. NATOA argues that the municipalities may be required to demonstrate that they lack resources to regulate rates, but not through a specific showing related to franchise fees. Rather, NATOA proposes, the showing should consist of a simple certification that the franchising authority does not have the resources to regulate, similar to the certification requirement for franchise authorities wishing to regulate (FCC Form 328). NATOA also points out that, in any event, the rules provide no guidance as to the level of funding that would be considered adequate or the type of showing required. The municipalities also argue that, regardless of the franchising authority's ability to regulate rates, the Cable Act requires the Commission to regulate rates if the franchising authority so elects.

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[24] However, to ensure that there is no absence of regulation solely because franchising authorities lack the resources to regulate, the rules allow franchising authorities to petition the Commission to regulate rates in their community. See discussion at paras. 39-43, *infra*.

41. We continue to believe that the rebuttal showing requirement is consistent with Section 622(i) of the Communications Act. While the Act provides that the Commission cannot directly control the franchising authority's use of the proceeds from the franchise fees, nothing prevents the Commission from basing a judgment on whether to assume regulation of basic tier rates on whether the franchising authority indeed lacks the funds to do so. The Commission's requirement is not a regulation of "the use of funds derived from such fees" within the meaning of Section 622(i), but is merely a test for determining which regulatory efforts should receive the benefit of the Commission's limited resources, based on the importance placed on that regulation by the respective franchising authority. The emphasis the franchising authority has placed on rate regulation will be demonstrated by whether the franchising authority will expend already available funds raised from the operation of the subject cable system in that effort. Such a requirement also ensures that the Commission expends its resources only where local regulation is most clearly shown not to be a viable alternative. Cf. Grove City College v. Bell, 465 U.S. 555 (1984) (reasonable conditions may attach to federal financial assistance).[25] Finally, we note that some courts have recognized that the purpose of the franchise fee is not only to compensate the franchising authority for the use of the public rights-of-way, but also for the costs of administering the franchise. See, *e.g.*, Telesat Cablevision, Inc. v. the City of Riviera Beach, 773 F. Supp. 383, 406 (S.D.Fla. 1991) (franchise fee constitutional under Cable Act because it related directly to costs of administering franchise as well as rental for rights-of-way); see also Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580 (W.D. Pa. 1987) (subsequent history omitted) (general flat tax can be tied to administrative or regulatory expenses incurred by governmental entity).

42. As to the specific showing required, the franchising authority would simply have to document the funds it raises from franchise fees and any general taxes, estimate the cost of rate regulation, and provide an explanation as to why the funds are insufficient to cover those costs. Some of these factors may include whether the franchise fee collected is less than five percent of the cable operator's gross revenues,[26] and whether costs may be shared among several municipalities by filing joint certifications. As we gain experience reviewing such requests, which we intend to resolve expeditiously, we will establish standards on a case-by-case basis to determine whether the franchising authority has sufficiently justified its request that the Commission regulate basic cable rates in a particular community.

43. With respect to the municipalities' argument that the Cable Act requires the

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[25] As stated earlier, however, if rate regulation is widely eschewed by franchising authorities, our entire scheme for achieving regulatory implementation of the rate regulation provisions of the 1992 Cable Act will have to be revisited, and this provision would be included in that reexamination.

[26] Section 622(b) of the Communications Act allows franchising authorities to collect franchise fees in an amount up to five percent of a cable operator's gross revenues during any 12-month period. 47 U.S.C. § 542(b).

Commission to regulate rates, regardless of the franchising authority's ability to so regulate, we already addressed this argument in the Rate Order. We stated that Congress envisioned local franchising authorities as the primary regulators of basic service rates under the Act's framework, and that we would not assume jurisdiction at this time where a franchising authority does not apply for certification. Rate Order at 5676.

44. Voluntary Withdrawal of Certification. Under the 1992 Cable Act, once a franchising authority is certified, only the emergence of effective competition nullifies the regulatory jurisdiction of both the authority and the Commission over basic cable rates. Specifically, the Act provides that in franchise areas where the Commission determines that effective competition exists, neither the local franchising authorities nor the Commission has the jurisdiction to regulate rates.[27]

45. On reconsideration of the Rate Order, Baraff, Koerner, Olender & Hochberg, and Booth American Company request that the Commission establish procedures for a franchising authority to voluntarily withdraw its certification to regulate basic rates. They observe that, under the 1992 Cable Act and the Rate Order, franchising authorities can avoid regulatory responsibility for basic cable service by not seeking initial certification from the Commission or by not asserting jurisdiction even after they are certified.[28] They argue that franchising authorities should also be allowed to voluntarily decertify their regulatory authority in the face of operational experience that shows that rate regulation is not in the best interests of the community.

46. Although Congress did not specifically provide for the voluntary decertification of franchising authorities, we believe Congress envisioned that franchising authorities would ultimately decide whether rate regulation is appropriate in their communities. Indeed, the fact that franchising authorities have a choice as to whether to seek certification is part of Congress's scheme to vest primary regulatory responsibility in franchising authorities. Accordingly, we will allow certified franchising authorities to notify the Commission that they have decided not to regulate rates, upon their determination that rate regulation would no longer serve the best interests of local cable subscribers.[29] Franchising authorities are

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[27] See Communications Act, § 623(a)(2), 47 U.S.C. § 543(a)(2). See also Communications Act, § 623(l)(1)(A)-(C), 47 U.S.C. § 543(l)(1)(A)-(C) (defining the term "effective competition").

[28] In either case, the Commission would not assert jurisdiction either by default or by request. See 47 C.F.R. §§ 76.910 and 76.915.

[29] The Commission retains the right to review such determinations and seek an explanation from the franchising authority concerning the factual finding underlying its decision to decertify. We will not prohibit a franchising authority from again seeking certification, even after it has decertified. However, if a pattern of repeated certification and

specifically prohibited from accepting consideration in exchange for their decision to decertify.

47. Franchising Authority's Failure to Meet Certification Requirements. In the Rate Order, we stated that we would automatically assume jurisdiction over basic cable rates when a franchising authority seeking initial certification does not have the legal authority to regulate rates or does not have rate regulations that are consistent with those of the Commission. In accordance with the Act, we retain jurisdiction in such cases only until the franchising authority has qualified to exercise jurisdiction by submitting a new certification and meeting the required statutory standard. See 47 U.S.C. § 543(a)(6); 47 C.F.R. § 76.913 (a). We indicated, however, that we would allow the franchising authority to cure any defects in its procedural regulations governing rate proceedings before we would assume jurisdiction. Rate Order, *supra* at 5676, 77; 47 C.F.R. § 76.910.

48. A number of cable operators request that the Commission refrain from exercising jurisdiction over basic rates where a franchising authority's initial certification is denied for failure to adopt regulations consistent with the Commission's rate rules. Petitioners express their concern that the Commission's present jurisdictional approach will discourage otherwise resourceful franchising authorities from adopting consistent regulations, so as to force the Commission to assume jurisdiction and allow the franchising authority to bypass the franchise fee rebuttal showing.[30]

49. We believe that our statutory obligations require us to assert jurisdiction over basic rates when a franchising authority's certification effort is denied for failure to adopt regulations that are consistent with the Commission's rate rules. We do not believe Congress intended for a franchising authority to regulate when its regulations will substantially or materially conflict with federal regulations.[31] Nor do we believe Congress intended that there be a regulatory vacuum when a franchising authority has affirmatively sought certification. Once a franchising authority has affirmatively sought certification because it believes basic

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decertification develops, we reserve the right to examine the situation to determine whether the franchising authority can justify its determinations as to the propriety of rate regulation in its community.

[30] The franchise fee rebuttal showing requires a franchising authority seeking Commission regulation of basic rates to rebut a presumption that its franchise fees provide the franchising authority sufficient financial resources to regulate. See discussion at para. 42, *supra*. See also 47 C.F.R. § 76.913.

[31] Indeed, in revocation cases where the Commission determines that a franchising authority's laws and regulations are not in conformance with Commission regulations, the statute instructs the Commission to assume jurisdiction directly. See Communications Act, § 623(a)(5), 47 U.S.C. § 543(a)(5). See also discussion at paras. 51-57, *infra*, concerning ability to cure minor rule conflicts in revocation cases.

rates to be unreasonable, and has indicated a willingness to regulate, we will step in to ensure that basic service rates are properly scrutinized until the franchising authority can become certified.

50. With respect to petitioners' argument that franchising authorities may use our jurisdictional scheme to evade the franchise fee rebuttal showing, we emphasize that our assumption of jurisdiction in such cases is meant to serve only as an interim solution, where possible, until the franchising authority can conform its regulations or overcome its legal impediment to satisfy federal regulations and become certified. We will therefore monitor such cases carefully and will expect franchising authorities to act in good faith to meet their certification obligations. Therefore, we reserve the right to treat a franchising authority's continued failure to meet certification requirements as if it were directly asking us to regulate. Regulation by us would, of course, be subject to the franchise fee rebuttal showing. See paras. 39-43, *supra*.

51. Revocation of Certification. The 1992 Cable Act establishes conditions for the denial or revocation of a franchising authority's certification. As a threshold matter, a franchising authority that seeks to exercise regulatory jurisdiction must meet certain statutory requirements; otherwise the Commission can deny its request for initial certification.[32] If, after a franchising authority has been certified, the Commission finds that the franchising authority has acted inconsistently with the statutory requirements, "appropriate relief" may be granted. However, if the Commission determines, after the franchising authority has had a reasonable opportunity to comment, that the state and local laws and regulations are not in conformance with the regulations prescribed by the Commission to regulate rates, then the Commission must revoke the jurisdiction of the authority. 47 U.S.C. § 543(a)(5).

52. In the Rate Order, we viewed the foregoing provisions as granting the Commission a degree of flexibility in revoking franchising authority certifications. Thus, we decided that if a franchising authority's actions are inconsistent with the statutory conditions for certification, we would issue a remand order directing the franchising authority to correct its defects before revoking certification and exercising jurisdiction. We observed that providing authorities with an opportunity to cure is supported by the language in the Act that calls for the granting of "appropriate relief" in such cases. Rate Order, *supra* at 5699.

53. By contrast, the Rate Order also indicated that we would directly revoke the

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[32] There are three statutory requirements. First, the franchising authority must adopt and administer rate regulations that are consistent with those of the Commission. Second, the franchising authority must have the legal authority and personnel to implement the necessary regulations. Third, the franchising authority's procedural regulations for rate proceedings must provide interested parties with a reasonable opportunity to comment. See Communications Act, § 623(a)(3)(A)-(C), 47 U.S.C. § 543(a)(3)(A)-(C). See also Communications Act, § 623(a)(4)(A)-(C), 47 U.S.C. § 543 (a)(4)(A)-(C) (setting forth that failure to meet three factors is cause for certification disapproval).

certification of a franchising authority if we found, after an opportunity for comment, that state and local laws and regulations do not conform to our rate regulations. We indicated that we took the directive of Section 623(a)(5), 47 U.S.C. 543(a)(5) -- that the Commission "shall revoke" certification if "state or local laws and regulations are not in conformance" with our rate regulations -- to apply to local and state rules that on their face conflict with ours, and which have been interpreted by state and local authorities to so conflict. We indicated that we would assume jurisdiction in such cases only until the authority could become recertified. Id.

54. NATOA requests that the Commission reconsider its rules for revocation of certification and include provisions that (1) clarify that a certification will be revoked only upon a showing that any nonconformance with the Cable Act or the Commission's rules is substantial; and (2) permit a franchising authority to cure any nonconformance with the Commission's regulations. NATOA observes that the Commission's rules permit a franchising authority to cure any defects in local regulations if such regulations are inconsistent with the statutory certification requirements expressed in Section 623(a)(3) of the 1992 Cable Act, 47 U.S.C. § 543(a)(3). NATOA indicates that, by contrast, a franchising authority is not given an opportunity to cure defects when its regulations are not in conformance with the rate provisions established by the Commission pursuant to Section 623(b).[33] NATOA argues that the distinction between the two grounds for revocation serves no purpose and that providing a franchising authority an opportunity to cure any nonconformance with the Commission's rules preserves the scarce resources of both the Commission and franchising authorities. In the absence of the opportunity to cure, NATOA points out, franchising authorities will be forced to file requests for recertification, which requests must be reviewed by the Commission. Additionally, NATOA contends that the Commission would preserve scarce resources if we revoke certifications only upon a finding that the nonconformance or inconsistency is substantial and material.

55. In response to NATOA's concerns, we will modify our position on Commission assumption of jurisdiction in revocation cases involving nonconformance with Commission regulations. As a general matter, we will allow a franchising authority to cure any nonconformance with our rules that does not involve a substantial or material regulatory conflict before we will revoke its certification and assume jurisdiction. On the other hand, we believe that the statute compels us to revoke the certification of any franchising authority once we find, after there has been an opportunity to comment, that state and local regulations conflict with our regulations in a substantial and material manner. More specifically, we will revoke the jurisdiction of a franchising authority for nonconformance when the state and local laws involve a substantial and material conflict with our rate regulations.

56. A twofold jurisdictional approach, one that allows franchising authorities to retain jurisdiction when there is a minor rule conflict but empowers the Commission to assume jurisdiction when there is a major rule conflict, makes good regulatory sense. In particular, we agree with NATOA that it preserves the scarce resources of the Commission and the

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[33] Compare 47 C.F.R. § 76.914(a)(1) with 47 C.F.R. § 76.914(a)(2).

franchising authorities to revoke only those certifications in nonconformance cases involving a substantial or material regulatory conflict. Otherwise, in every case of nonconformance, regardless of how insignificant the rule conflict, we would be revoking certifications and forcing franchising authorities to file petitions for recertification. The Commission would bear the additional burden in such cases of assuming regulatory authority over basic cable rates and reviewing the recertification requests of the local authorities. We conclude there is no good reason for such requirements when a franchising authority that has been proceeding under Commission-certified regulatory authority can easily "cure" a rule conflict.

57. We believe the statute provides us with the flexibility to undertake this approach. The Act's provision for "appropriate relief" in Section 623(a)(5), 47 U.S.C. 543(a)(5), permits us to establish a procedure by which franchising authorities can "cure" certification inconsistencies -- even those involving minor regulatory conflict. Rate Order, *supra* at 5699. We believe that it is reasonable to interpret Section 623(a)(5)'s concomitant requirement, that the Commission revoke the jurisdiction of a franchising authority administering nonconforming state and local laws and regulations, to apply to cases involving only substantial or material regulatory conflict, as described above.

B. Franchising Authority's Basic Rate Decision.

58. Cost-of-Service Showings for Basic Tier Rates. Some local franchising authorities may have resources and personnel sufficient to conduct a review of a rate-setting justification based on an FCC Form 393 (and/or FCC Forms 1200/1205), but not to examine and review a cost-based showing. This concern may have discouraged certification by many local franchising authorities. We believe that the Commission, consistent with the statutorily shared jurisdictional framework for regulation of the basic service tier, should provide assistance to certified local franchising authorities that are unable to conduct cost-based proceedings. Accordingly, on our own motion, we have decided to establish procedures under which the Commission, if requested by the local franchising authority in a petition for special relief under Section 76.7 of the Commission's rules, will issue a ruling that makes cost determinations for the basic service tier. The ruling will also set an appropriate cost-based rate, and will become binding on the local franchising authority and the cable operator. Specifically, local franchising authorities receiving cost-of-service showings from cable operators seeking to justify either initial rates or rate increases for the basic service tier will be able to obtain such a Commission ruling on their behalf for those submissions pending no more than 30 days before May 15, 1994, or those made on or after that date.

59. Under these procedures, upon receipt of a cost-of-service showing, a local franchising authority will have 30 days to decide whether to seek Commission assistance.[34]

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[34] Under the Commission's current rules, if a franchising authority is able to determine that a cable operator's current rates for the basic service tier and accompanying equipment are reasonable under the Commission's rate regulations, the rates will go into effect 30 days after they are submitted. If the franchising authority is unable to determine the reasonableness

If the franchising authority decides to seek Commission assistance, the franchising authority must issue a brief order to that effect, and serve a copy (before the 30-day deadline) on the cable operator submitting the cost showing. In its request for Commission assistance, the local franchising authority must explain its reasons for seeking Commission assistance, such as lack of adequately trained personnel, lack of financial resources, or other exigent circumstances. Upon receipt of the local authority's notice to seek Commission assistance, the cable operator must deliver a copy of the cost showing together with all relevant attachments to the Commission within 15 days.[35]

60. The Commission's determination of cost-based rates for the basic service tier will be governed by Section 76.945 of the Commission's rules, and will become binding upon the local franchising authority. The Commission will notify the local franchising authority and the cable operator of its determination and the basic service tier rate, as established by the Commission. The rate will take effect upon implementation by the local franchising authority and the appropriate remedy, if applicable will be determined by the franchising authority. A cable operator or franchising authority may seek reconsideration by Commission staff, or review by the full Commission, of the staff ruling on the cost-based determination or the rate itself, pursuant to Section 1.106 or Section 1.115 of the Commission's rules.

61. We believe that this procedure will not present significant burdens to the Commission. Pursuant to our rate regulations, operators facing regulation of both the basic and cable programming services tiers already are required to select the same method of initial regulation for both tiers.[36] Thus, for example, if a cable operator, in response to a subscriber complaint, chooses to justify cable programming service rates with a cost showing to the Commission, the operator is required to submit a cost-of-service showing to the local franchising authority in response to an initial notice of regulation concerning basic service received within one year of the initial date of regulation of the cable programming services tier. Therefore, in many cases, the Commission will simply conduct parallel cost determinations for both tiers of service rather than only for the cable programming service tier, thereby creating efficiencies by eliminating duplicative analyses. Further, this approach will permit many local authorities to focus their resources on administering and enforcing the cost-based rate established by the Commission, rather than on reviewing the operator's cost

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of the rates within this period, and the operator has submitted a cost-of-service showing, the franchising authority may toll the effective date of the rates in question for an additional 150 days to evaluate the cost showing. See Rate Order at 5709; 47 C.F.R. § 76.930.

[35] We will classify referrals of cost-of-service cases from local franchising authorities as restricted proceedings for purposes of our *ex parte* rules. Accordingly, *ex parte* presentations are prohibited. See 47 C.F.R. § 1.1208 (1992).

[36] See Third Report and Order in MM Docket No. 92-266, 8 FCC Rcd 8444 (1993).

showing. This, in turn, should increase incentives for local franchising authorities to certify and regulate basic cable service. Thus, we believe this approach will benefit consumers.

62. Delegation of Authority and Form of Decision. King County asks the Commission to clarify that the authority to make rate decisions and to issue written orders may be delegated to specified governmental agents such as a local cable commission. In the Rate Order, we noted that a state, while remaining the franchising authority, may delegate its rate regulating power to localities if the state's statutory scheme permits it. Rate Order, *supra* at 5685. Similarly, we find that the 1992 Cable Act does not prohibit franchising authorities, if so authorized by state and/or local law, from delegating their rate-making responsibilities to a local commission or other subordinate entity, even if that entity is not the "franchising authority" entitled to certification under the Act.[37] Any such subordinate entity will be acting as the authorized agent of and at the will and pleasure of the franchising authority, and its actions will be subject to at least the implicit, if not explicit, ratification of the full franchising authority. We believe that because of the many demands placed on municipalities and other entities that serve as franchising authorities, such flexibility is necessary to better enable franchising authorities to implement and enforce the Commission's regulations within the time frames specified in our procedural rules.

63. These petitioners also request that the Commission clarify that rate decisions need not be issued by resolution or ordinance, but may be made by letter or any other form, as long as they meet the public notice requirements. In the Rate Order, we required that a franchising authority issue a written decision to the public and give public notice of such decision whenever it disapproves, in whole or in part, either initial rates or an increase in rates or when it approves a proposed rate over the objections of interested parties. Id. at 5715, 16. Provided that issuance of the decision satisfies the Rate Order's public notice requirements, franchising authorities, or the state or local governments, may determine the particular form such rate decisions will take.

64. Due Process Concerns. In the Rate Order, we afforded franchising authorities considerable flexibility regarding the manner in which interested parties may participate in proceedings regarding rates for the basic service tier and accompanying equipment, as long as they provide a reasonable opportunity for consideration of the views of interested parties and act within the prescribed time periods. Rate Order, *supra,* at 5716. We also gave franchising authorities the flexibility to decide whether and when to conduct formal or informal hearings, as long as they act on rate cases within the prescribed time periods to provide interested parties with notice and a meaningful opportunity to participate. Id.

65. Colony Communications and Viacom take exception to our provision of flexibility regarding rate hearings. They request that we clarify that due process concerns may require a formal hearing under certain circumstances. Specifically, petitioners argue that informal

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[37] Section 602(10) of the Communications Act defines franchising authority as any governmental entity empowered by Federal, State, or local law to grant a franchise. 47 U.S.C. § 522(10).

procedures, while reducing administrative burdens on franchising authorities and cable operators, may not be sufficient to protect cable operators' rights under the Due Process Clauses of the Fifth and Fourteenth Amendments, particularly where there are material issues of fact in dispute. Thus, petitioners suggest, in cases where material issues are in dispute and the cable operator has requested a formal hearing and has submitted a reasoned analysis to support its request, the franchising authority must convene a formal hearing.

66. Our determination in the Rate Order that franchising authorities may decide whether and when formal hearings are necessary is not inconsistent with petitioners' contentions. This determination will rest largely upon whether the particular rate issue presents a material issue of fact that can be resolved only through an adjudicative trial-type hearing. See K. Davis, Administrative Law Treatise §§ 12:1; Northwestern Indiana Telephone Co. v. FCC, 824 F.2d 1205 (D.C. Cir. 1987); Connecticut Office of Consumer Council v. FCC, 915 F.2d 15 (2d Cir. 1990), cert. denied, 111 S. Ct. 1310 (1991). Rather than impose specific procedural requirements on each individual franchising authority, we find it more appropriate at this juncture to remind franchising authorities to examine their current procedural requirements for other local proceedings and determine the best forum for providing due process to cable operators. In any event, a cable operator is not without redress if it determines that the franchising authority has denied the operator its due process rights. Pursuant to Section 76.944 of the Commission's Rules, the cable operator may raise that argument in its appeal to the local courts of the franchising authority's written decision. 47 C.F.R. § 76.944; Rate Order, *supra* at 5729, n. 388.

67. Appeals. We stated in the Rate Order that cable operators must file appeals of local rate decisions with the Commission within 30 days of release of the text of the franchising authority's decision. Id. at 5730, 31; 47 C.F.R. § 74.944(b). Oppositions may be filed within 15 days after the appeal is filed, and must be served on the party or parties appealing the rate decision. Replies may be filed seven days after the last day for oppositions and must be served on the parties to the proceeding. 47 C.F.R. § 76.944(b).

68. NATOA requests that the Commission add a provision requiring parties filing appeals with the Commission to serve a copy of the appeal on the franchising authority or the delegated authority that issued the basic rate decision. NATOA contends that such a requirement is consistent with other provisions in the Commission's Rules, such as Section 76.914. This request is unopposed.

69. We will amend Section 76.944(b) to require any party filing an appeal of a local rate decision to serve a copy of the appeal on the appropriate decisionmaking authority. Additionally, where the state is the appropriate decisionmaking authority, the state must forward a copy of the appeal to the appropriate local official(s). This requirement would serve Congress's mandate in Section 623(b)(5)(B) of the Communications Act, 47 U.S.C. 543(b)(5)(B), that the Commission establish procedures for the expeditious resolution of disputes between cable operators and franchising authorities, and would not impede the filing

process nor delay Commission consideration of appeals.[38]

70. Settlement of Rate Cases. We stated in the Rate Order that the regulatory structure established by Section 623 of the Communications Act, 47 U.S.C. 543, does not appear to give cable operators the latitude to settle rate cases. Rather, a franchising authority must follow procedures that are consistent with the Commission's rate regulations and make a reasoned decision based on the record. Rate Order, *supra* at 5715, n. 337. Several cable operators argue that they should be permitted to enter into settlement agreements with franchising authorities, because such agreements would save the resources of all parties.

71. For largely the same reasons that we prohibited agreements not to regulate basic rates,[39] we affirm our intention to disallow settlement agreements that are based on factors outside the record of a rate proceeding. Permitting such settlements could potentially allow franchising authorities to bargain away subscribers' statutory protection against unreasonable rates. Furthermore, the availability of settlements could increase the number of cost-of-service showings, which would be more suited to negotiated resolutions. Parties in a rate-setting procedure may, of course, stipulate to particular facts and even the final rate level itself, as long as the basis for each such stipulation is clearly articulated, there is some support for each stipulation in the record, and it does not circumvent our rate regulations.

72. Effective Date of Rate Increases. In the Rate Order, we noted that unless the franchising authority finds that a proposed increase in basic tier rates is unreasonable, the increase will go into effect 30 days after filing with the franchising authority. If the franchising authority is unable to determine whether the proposed rate increase is reasonable, or if the cable operator has submitted a cost-of-service showing seeking to justify a rate above the presumptively reasonable level, the franchising authority may delay the effective date of the proposed rate for 90 days, or 150 days, respectively. Rate Order, *supra* at 5709; 47 C.F.R. 76.930.[40] Viacom now requests modification of our rules to allow a reviewing authority that is unable to determine whether a particular portion of a proposed rate increase is reasonable to permit those portions of the rate increase it finds reasonable to go into effect immediately. Viacom argues that delays in the approval of new increases limit the operator's ability to recover its full costs.

73. We find that where the questionable portion is clearly severable, a franchising authority may, at its discretion, permit the implementation of portions of a rate increase it

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[38] We will classify appeals of local rate decisions as restricted proceedings for purposes of our *ex parte* rules. Accordingly, *ex parte* presentations are prohibited. See 47 C.F.R. § 1.1208 (1992).

[39] First Rates Reconsideration, *supra*, at para. 72.

[40] To toll the effective date of the proposed rate, the franchising authority must issue a brief order, within the initial 30-day period, explaining that it needs additional time to review the proposed rate. Id.

finds reasonable while it reviews the reasonableness of other portions. This policy will permit cable operators to recoup as promptly as possible those costs that are deemed acceptable by the franchising authority.

74. Proprietary Information. In the Rate Order, we stated that franchising authorities will have the right to collect additional information -- including proprietary information -- to make a rate determination in those cases where cable operators have submitted initial rates or have proposed increases that exceed the Commission's presumptively reasonable level. Rate Order *supra* at 5718-19. We also required franchising authorities to adopt procedures analogous to those contained in Section 0.459 of the Commission's Rules.[41] Id., n. 349. See 47 C.F.R. § 76.938.

75. King County requests that the Commission clarify whether the requirement that they adopt procedures "analogous" to Section 0.459 permits them to follow the corresponding state or local freedom of information, open records, and other sunshine-type laws, or whether the Commission intended Section 0.459 to preempt all state and local laws governing access to information. They are concerned that cable operators may choose not to submit confidential business information requested by the franchising authority if they believe it is not protected under the state or local law, whose exemptions may differ from those of the federal Freedom of Information Act. Michigan C-TEC Communities also points out that the city itself could be subject to attorney's fees under some state access laws under Section 623(a)(4)(A), 47 U.S.C. § 543(a)(4)(A). Michigan C-TEC Communities also fears that cable operators could use the inconsistent state and local access laws to argue that the franchising authority's certification is invalid under Section 623(a)(4)(A). Time Warner argues that Section 623(b)(2)(A), which directs the Commission to prescribe regulations that reduce administrative burdens on the parties, supports the adoption of a single standard to govern the protection of proprietary information.

76. With respect to the franchising authority's right of access to the cable operator's confidential business records, Booth American Company requests that we reconcile a perceived inconsistency between the Rate Order and the rule. It asks us to clarify whether the franchising authority can request proprietary information only in reviewing a cost-of-service showing (as the petitioner believes the Rate Order implies) or in all rate cases. Petitioner argues that, according to the Rate Order, the right to proprietary information arises where the rates in question already "exceed the Commission's presumptively reasonable level," which petitioner interprets to refer only to cost-of-service showings. Rate Order, *supra* at 5718. The text of the rule itself, however, according to petitioner, specifically

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[41] Section 0.459 provides that a party submitting information may request confidentiality with respect to specific portions of the material submitted. The party must make a showing, by a preponderance of the evidence, that non-disclosure is consistent with Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552, which authorizes the Commission to withhold from public disclosure confidential commercial or financial information.

allows the franchising authority to request such information "to make a rate determination," which would presumably allow franchising authorities to request such information for proceedings to apply the competitive differential, as well as cost-of-service proceedings. 47 U.S.C. § 76.938. NATOA opposes the suggestion that franchising authorities may request such information only with respect to cost-of-service showings and argues that Section 623(g) gives franchising authorities clear access to necessary information to administer the statute in all proceedings.

77. Petitioners raise two distinct issues, one relating to the franchising authority's access to the cable operator's confidential business records in making a rate determination, the other relating to the scope of the franchising authority's obligations regarding public disclosure of the operator's proprietary information after it is submitted. With respect to the first issue, we find that franchising authorities and the parties to a rate proceeding must have access to the information upon which the rate justification is based. Such access is essential to permit the franchising authority to make an informed evaluation, based on complete information, of the reasonableness of the rate in question. Parties participating in the rate proceeding must have access to proprietary information submitted to the franchising authority in order to evaluate the arguments advanced by the cable operator and to help focus the issues. Without such access, franchising authorities may be frustrated in their attempts to set reasonable rates. See 47 U.S.C. § 543(b). With respect to any arguable inconsistency between the text of the Rate Order and the rule itself, we clarify that franchising authorities are entitled to request information, including proprietary information, that is reasonably necessary to make a rate determination, whether pursuant to a cost-of-service showing or when applying the competitive differential, as clearly stated in the text of the final rule adopted. 47 C.F.R. § 76.938. Each request should state clearly the reason the information is needed, and where related to an FCC Form 393 (and/or FCC Form 1200/1205), indicate the question or section of the form to which the request specifically relates. This specificity will enable franchising authorities to ensure the validity of the information provided in order to arrive at a determination of the reasonableness of the rates proposed, while at the same time ensuring that cable operators are not required to provide additional data that is not germane to the rate-setting process. This interpretation is consistent with Section 623(g) of the Act, which requires cable operators to file with franchising authorities financial information "as may be needed for purposes of administering and enforcing this section." 47 U.S.C. § 543(g).

78. This right of access is limited to that information necessary to support the elements of the particular rate justification at issue, and extends to the franchising authority and, in appropriate circumstances, to the actual parties to a rate proceeding.[42] Section 76.938 governs such access and, to the extent that any state or local laws provide for more limited access to information than the federal rule, they are accordingly preempted. As a general

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[42] Franchising authorities should, in appropriate circumstances, adopt procedures or craft protective agreements to ensure that proprietary information is not disclosed publicly by the parties.

matter, we have the authority to preempt state or local laws that are inconsistent with federal law and regulations. City of New York v. FCC, 486 U.S. 57, 64 (1988); Fidelity Federal Savings and Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982) (the statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof). It was never our intention to allow cable operators to use any state or local law to withhold business information it would otherwise have to produce under the federal rule. State or local laws that conflict with the federal right of access embodied in our rule would frustrate the purpose of the rule -- that is, to permit the franchising authority to make an informed evaluation of the rate in question so as to ensure the reasonableness of basic tier rates as required by Section 623(b) of the Act. Preemption is therefore permitted and necessary.

79. With respect to the public disclosure issue, we find on further reflection that we should not require franchising authorities to adopt procedures that mirror Section 0.459, although they may do so in their discretion. We find it neither necessary nor desirable to preempt state and local laws governing access to information. Rate regulation of basic cable services has been designated by the Congress and this Commission as an essentially local matter, and it involves local businesses providing local services. Local (including state) governments have instituted access laws to govern the confidentiality of the business information of the business entities in their respective jurisdictions as they have seen fit for their particular circumstances and interests. We see no justification sufficiently compelling to override that prerogative. Additionally, as one municipality points out, many state utility commissions are subject to the same state laws as franchising authorities, many of which differ from the federal FOIA, and "there is no good reason why claimed proprietary information of a cable operator should be treated differently than comparable information of another regulated entity."[43] Moreover, requiring adoption of local rules that would implement Commission access rules would invoke this agency's oversight by review of all local access decisions. Such a situation could hopelessly paralyze the local rate-setting proceedings throughout the country. While we acknowledge that consistent treatment of the public's access to proprietary information could lessen the burden in some cases for some multiple system operators whose systems may be subject to varying disclosure laws in different jurisdictions, this possibility is outweighed by the other considerations just cited. Thus, while as a general matter we believe franchising authorities should consider the interests of cable operators in protecting proprietary information, we now conclude that franchising authorities should proceed in accordance with applicable local and state law rather than mandating the adoption of procedures analogous to our rules. We therefore amend Section 76.938 accordingly.

80. Forfeitures and fines. To the extent that franchising authorities may be concerned with the enforcement of their own orders, decisions, and requests for information, we clarify that if a franchising authority has the power under state or local law to impose forfeitures or fines for violations of its rules, orders, or decisions, including filing deadlines and orders to provide information, we see nothing in the Cable Act or our rules which would prevent the

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[43] Petition of Michigan C-TEC Communities at 10.

franchising authority from taking such action.[44] A franchising authority would be free to report to us any apparent violation of our rules, and, should we determine that a violation has in fact occurred, we could take appropriate enforcement action.[45] In addition, we are modifying our rules to require cable operators to respond to franchising authorities' reasonable requests for information, as well as our own such requests.[46]

81. Franchising authority discretion. We also take this opportunity to reiterate our general philosophy regarding rate proceedings before franchising authorities. Congress generally allocated to franchising authorities responsibility for reviewing basic service rates under the Act. While we have set out the general rules for regulation, we have not attempted, nor could we address, every detail of the rate regulation process. A certain amount of latitude has been left to franchising authorities. As we stated in the Rate Order, we will not review decisions of franchising authorities *de novo*, but rather will sustain their decisions as long as there is a reasonable basis for those decisions. Id. at 5731. This standard of review will apply as well with respect to franchising authority interpretations of any ambiguities in evaluating the responses or information provided on the FCC Form 393 (and/or FCC Forms 1200/1205) or in a cost-of-service showing.

C. FCC Form 393 (FCC Forms 1200/1205) Issues/Failure to File.

82. Failure to file rate justification. Under our rules, a cable operator has the burden of proving that its rates for regulated cable services are in compliance with the law.[47] It must justify its rates within 30 days of either (1) receiving notification from a franchising authority that it is commencing regulation of basic service rates or (2) the service date of a complaint regarding the reasonableness of cable programming service tier rates.[48] An operator justifies its rates by submitting its rate schedule and by also filing a completed FCC Form 393 (and/or FCC Forms 1200/1205), or a cost-of-service showing.

83. Our rules regarding regulated cable programming service tiers explicitly provide that if a cable operator fails to file and serve a rate justification as required, we may deem the operator in default and enter an order finding the operator's rates unreasonable and mandating appropriate relief.[49] However, the rules do not explicitly provide parallel

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[44] See 47 C.F.R. § 76.943. As stated in the regulation, however, a franchising authority may not impose a forfeiture or fine simply because an operator's rates are unreasonable.

[45] See Communications Act, § 503, 47 U.S.C. § 503; 47 C.F.R. §§ 76.943, 76.963.

[46] See 47 C.F.R. § 76.943 (as modified).

[47] 47 C.F.R. §§ 76.937, 76.956(b).

[48] 47 C.F.R. §§ 76.930, 76.956(a).

[49] 47 C.F.R. § 76.956(e).

remedies where an operator fails to timely justify its rates for the basic service tier.

84. On our own motion, we hereby correct the oversight. An operator that does not attempt to demonstrate the reasonableness of its rates has failed to carry its burden of proof. We are therefore amending our rules to make clear that authorities regulating basic service rates have authority to deem a non-responsive operator in default and enter an order finding the operator's rates unreasonable and mandating appropriate relief. This relief could include, for example, ordering a prospective rate reduction and a refund. Such a refund would be based on the best information available at the time. We note, however, that in the Second Order on Reconsideration, we establish certain adjustments to the timeframes set out in Sections 76.930 and 76.933 due to the transition from existing rules to the rules we establish today. A franchising authority will not be permitted to find in default a cable operator that files its rate justification in accordance with the scheme set forth in the Second Order on Reconsideration at paras. 144-149.

85. We believe that rate regulators must have this authority to allow them to deal swiftly and effectively with non-compliant operators. Otherwise, non-compliant operators could subvert the regulatory system we have set in place to ensure reasonable rates. Of course, such remedial power is not unbounded and must be exercised reasonably.[50] It should not be exercised in a case of a *de minimis* failure on the part of the cable operator to respond. We do not mean to countenance over-zealous behavior by franchising authorities. Rather, we wish to make clear that franchising authorities have this power to deal with operators who ignore their legal obligations.[51]

86. Deficient rate justifications; additional information. Our early experience with FCC Form 393 rate justifications has also revealed instances where cable operators have apparently filed justifications that are incomplete in various respects, or that require clarification or substantiation. We will here outline how such filings should be treated.

87. We have considered various options for resolving these problems, including declaring that an incomplete filing may be rejected automatically and treated as a non-filing. However, this would produce an unduly harsh result for cable operators, especially small

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[50] For example, we do not believe that it would be reasonable for a franchising authority to declare rates unreasonable and order a prospective rate reduction and refunds if an operator filed a completed FCC Form 393 (and/or FCC Form 1200/1205) on the 31st day after receiving notice of regulation from the franchising authority.

[51] We reiterate here that in any Commission review on appeal of a franchising authority's rate determination, we will not conduct a *de novo* review. Rather, we will affirm the decision if we find that the franchising authority has provided a reasonable basis in its written decision for the action it has taken in response to the cable operator's noncompliance. Rate Order, *supra*, at 5731.

system operators, who have filed in good faith but have for some reason left a portion of their filing incomplete or unclear. We therefore adopt a more moderate approach that will present cable operators with an opportunity to cure defects in their filings or supply additional information as necessary.

88. In the event a cable operator files a facially incomplete rate justification, *viz.*, fails to complete the form or fails to include supporting information called for by the form, the franchising authority or the Commission may order the cable operator to file supplemental information. While the franchising authority is waiting to receive this information from the cable operator, the deadlines for the franchising authority to rule on the reasonableness of the proposed rates are tolled.[52]

89. We distinguish an incomplete filing (for example, a form filed without a required explanation) from one which is complete and submitted in good faith, but about which the regulating authority has certain questions or reasonably feels it requires clarifying or substantiating information. As we confirm in paragraphs 74-77, *supra*, the regulatory authority in such a situation has the right to request and receive clarifying or substantiating information. However, we will not automatically toll the deadlines for franchising authorities to act in these circumstances, as we do for incomplete filings. If the information sought, however, is of such significance as to delay examination of the rest of the rate justification, or if the operator fails to supply the information promptly, the franchising authority could be justified in delaying its ruling accordingly.

90. In either case, it is obviously necessary for the franchising authority or the Commission to set reasonable deadlines for the submission of supplemental information in order to avoid delaying for consumers the benefits of rate regulation. [53] If the cable operator fails to provide the requested information within the required time or fails to provide complete information in good faith, the franchising authority or the Commission may then hold the cable operator in default and mandate appropriate sanctions as discussed elsewhere in this section, as if the operator failed to submit a response at all. We again emphasize that such authority must be exercised in a reasonable manner.

91. We take this opportunity to re-emphasize that any and all information submitted as part of the rate-setting process must be truthful in all respects, just as any information must be truthful when supplied in a Commission proceeding. Misrepresentation or willful concealment of any relevant matter in a rate proceeding may result in, among other things,

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[52] Once the supplemental information has been served on the franchising authority, the time for determining the reasonableness of the rate by the franchising authority will recommence.

[53] Supporting information that is called for in the FCC Form 393 (and/or FCC Forms 1200/1205) should have been submitted with the form, and could reasonably be demanded within a short period of time.

Commission-ordered forfeitures and/or the denial of renewal or revocation of any Commission license held by the offending cable operator.

92. Finally, in order to assist the Commission and franchising authorities in verifying information contained in rate filings, cable operators filing after the effective date of our revised rules must include rate cards and channel line-ups along with their benchmark or cost-of-service filings. If there is any difference between the numbers on these documents and the numbers in the rate filing, the cable operator must attach an explanation. Rate cards and channel line-ups must be included for September 30, 1992, September 1, 1993, and for the rates being reviewed.

93. Updating rate calculations. We now turn to the issue that arises for numerous operators that promptly revised their rates in response to our rules, based on rate-setting facts in existence at the time of the revisions.[54] These operators have not been required to justify those rates until recently, however, and several months after the revisions, some of the facts or data on which the rate-setting is based may have changed.[55] For example, tentative inflation adjustments have since become definite, equipment costs may have varied, or channels may have been added. We share National Cable Television Association's concern that rates adopted in an effort to comply with our rules as quickly as possible may become unreasonable solely as a result of using later data to refresh the calculations. Operators should not be penalized for making good faith attempts to comply with our rules in a timely manner. In addition, if the cable operators are required to revise their rates immediately based on refreshed data, the changes will result in significant administrative expenses to the operators and confusion for subscribers. In most cases, we expect the resulting rate change would be minimal and would be in effect only until the cable operator seeks a rate change. At the same time, it is important that regulatory authorities are able to verify accurately the reasonableness of a current rate, and to avoid compounding any inaccuracies as subsequent rate increases are introduced, which are a function of the level of initial rates.

94. Accordingly, we will require the following actions when different rates are dictated by data used in initial rate-setting than by data current as of the time an FCC Form 393 (and/or FCC Forms 1200/1205) is actually submitted to the franchising authority or the Commission. When current rates are accurately justified by analysis using the old data (and that data was accurate at the time), cable operators will not be required to change their rates.

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[54] This issue was raised by the National Cable Television Association in its November 29, 1993 *ex parte* filing with the Commission concerning practical problems with FCC Form 393 Instructions. This issue was also discussed in Continental Cablevision's *Emergency Petition for Reconsideration of "Questions and Answers" of November 10,* filed with the Commission on November 15, 1993.

[55] The same problem could arise any time rates are established at one point in time but subject to justification as of a later date.

In these circumstances, however, when such operators make any subsequent changes in their rates (such as when seeking their annual inflation increase), those changes must be made from rates levels derived from the updated information.[56] When current rates are not justified by analysis using the old data (so that a rate adjustment would be necessary in any event), cable operators will be required to correct their rates pursuant to current data. In these circumstances, the resulting rates must be based on current data.[57]

95. Computer-generated forms. Many cable operators have filed their rate justifications on various substitute versions of FCC Form 393, often computer-generated. Indeed, our November 10, 1993 Public Notice specifically contemplated such substitutes, provided "the form is *identical* in overall appearance and format to FCC Form 393" (emphasis added). Unfortunately, our initial review of such filings has revealed a wide variety of substitute forms, none of which appears to be "identical in overall appearance and format to FCC Form 393."

96. Given the variations in these forms as filed and the difficulty in verifying their conformance to the official FCC Form 393, we conclude that the burden on franchising authorities and on the Commission of processing such non-standard forms would be substantial. If each cable operator submitted its own version of FCC Form 393, it would be virtually impossible to establish any uniform system of review or to verify the accuracy of the filings with any degree of certainty.

97. We therefore decide that such substitute forms are unacceptable. All rate filings must be made on an actual FCC Form 393, (and/or FCC Forms 1200/1205), a copy of the actual form, or a copy generated by Commission software. The burden on cable operators to use the Commission's form is small, since they may generate the data in whatever form they wish and simply transfer it to the official form. By contrast, this requirement should significantly reduce the processing burden and increase the accuracy of review by regulatory authorities and other interested parties.

98. Accordingly, any future rate filing not made on an official FCC Form 393 (and/or FCC Forms 1200/1205), a copy of the form, or a copy generated by Commission software,

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[56] We take this action on the assumption that any rate differentiation based on old and current data is quite small, so that the harm to consumers is small compared to the negative effects discussed above. In a particular case where this is not so, the franchising authority can petition for a waiver of our rules to impose an immediate rate reduction using current data.

[57] In any case, the franchising authority retains the discretion to permit retention of an established rate that is close to, but not exactly, the rate justified by the benchmark system, with a corresponding reduction taken from the next rate increase, in order to reduce rate churn, if it determines that this best serves the interests of the cable subscribers within its jurisdiction.

shall be deemed not to have been filed, and appropriate sanctions for failure to file may be imposed. For example, under appropriate circumstances, regulatory authorities may treat non-complying forms as patently defective, thus not requiring an opportunity to cure the defect as would be the case for a filing that is merely incomplete. Obviously, this sanction should not be imposed where an operator has made a good faith effort to comply with our rules. If a cable operator has made a rate filing on a non-FCC form prior to the effective date of these rules, the franchising authority may order that the form be re-filed within 14 days. The cable operator shall then have 14 days to submit its rate filing on an FCC Form 393 (and/or FCC Forms 1200/1205), during which time the deadline for the cable authority to rule on the reasonableness of the rates shall be tolled. Although we considered deeming non-standard forms already filed acceptable, we believe the administrative burden of attempting to implement the rules based on non-complying forms is unacceptable. We hereby order all cable operators who have filed benchmark showings with us on a non-FCC form to refile within 14 days of the effective date of this Order. Furthermore, any benchmark showing that comes to the Commission on appeal must be on an official FCC Form 393 (and/or FCC Forms 1200/1205), a copy of the form, or copy generated by Commission software.

D. Refund Issues.

99. Commission Authority to Allow Franchising Authority to Order Refunds on Basic Tier Rates. We stated in the April 1993 Rate Order that refunds are available with respect to basic tier service pursuant to our authority under Sections 623(b) and 4(i) of the Communications Act, 47 U.S.C. §§ 543(b), 154(i). We determined that the Communications Act's explicit reference to refund authority with respect to cable programming service tier service should not be construed to bar refunds of unreasonable basic tier rates. Rate Order, *supra* at 5725. We noted that Section 623(b)(5)(A), 47 U.S.C. 543(b)(5)(A), grants wide discretion to adopt procedures so that franchising authorities can enforce reasonable rates.

100. The National Cable Television Association, Time Warner, and the Arizona Cable Television Association argue that the Communications Act does not give the Commission the authority to order refunds for the basic tier services. They note that Section 623(a)(1), 47 U.S.C. 543(a)(1), provides that "[n]o federal agency or state may regulate the rates for the provision of cable service except to the extent provided" under the statute. They also repeat the argument that, although Congress specifically authorized refunds for cable programming tier services, it did not provide a parallel authorization for basic tier service. Petitioners contend that the Commission has violated the principle of statutory construction that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[58]

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[58] Russello v. United States, 464 U.S. 16, 23 (1983) (explaining the principle of *expressio unius est exclusio alterius*).

101. Petitioners' argument ignores the breadth of the Commission's mandate and authority in this area. As we noted in the Rate Order, Section 623(b)(1), 47 U.S.C. 543(b)(1), gives the Commission broad rulemaking power to "ensure that the rates for the basic service tier are reasonable" and to "protect[] subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition." Moreover, Section 623(b)(5) directs the Commission to adopt procedures by which "franchising authorities may enforce the [rate] regulations prescribed by the Commission... ." Section 623(b)(5) thus grants the Commission wide discretion to craft procedures governing the enforcement of its overall regulatory regime with respect to basic tier rates. Finally, Section 4(i) of the Communications Act, 47 U.S.C. 154(i), expressly authorizes the Commission to issue orders "not inconsistent with this Act, as may be necessary in the execution of its functions." Requiring cable operators to return to subscribers unreasonable basic tier charges effectuates the express requirements of Section 623(b) and is fully within the Commission's authority.[59]

102. The fact that Section 623(b) does not mirror the remedial procedures in Section 623(c), which governs cable programming service tier rate complaints and contains an express provision for refunds, does not change our conclusion. In New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101 (D.C. Cir. 1987), cert. denied, 490 U.S. 1039 (1989), the court held that, pursuant to Section 4(i), the Commission may require carriers to refund earnings in excess of a Commission-prescribed authorized rate-of-return even though refunds are not expressly authorized, and even though another part of Title II of the Communications Act expressly permits an award of damages against carriers for other types of violations. Thus, the mere fact that Section 623(c) provides for refunds in the upper tier context does not persuade us that the Commission's authority under Section 4(i), in conjunction with its rulemaking power under Section 623(b), is not broad enough to permit the Commission to adopt rules providing for refunds with respect to basic tier rates. This is especially true when refunds are necessary in order to achieve compliance with Section 623(b)'s directive that the Commission shall "ensure that rates for the basic service tier are reasonable." We thus conclude again that we may permit refunds for unreasonable basic tier rates to enforce the provisions of Section 623(b) pursuant to our authority under Sections 623(b)(1), (b)(5), and 4(i) of the Communications Act.[60]

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[59] It is also in accord with the Conference Report accompanying the Commission's 1993 supplemental appropriation to implement the 1992 Cable Act, as discussed *infra* in para. 108.

[60] As an additional matter, Viacom argues that because the size of the refund, the nature of subscriber records, and the extent of customer turnover may differ from system to system, cable operators should be given the flexibility to determine how to distribute refunds. This issue was fully considered and addressed in the Rate Order, where we encouraged cable operators, with respect to both upper and basic tier service, to identify the actual subscribers who are owed refunds, if such a procedure can be accomplished without unreasonable burden, and refund the

103. Refund Computations. Another issue which we need to address is that of refund computations for bundled charges. Our rules state that a franchising authority "may order a cable operator to refund to subscribers that portion of previously paid rates determined to be in excess of the permitted tier charge or above the actual cost of equipment . . . ."[61] Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates.

104. We conclude that the refund liability should be calculated based on the difference between the old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s). The intent of the refund mechanism is to place subscribers in the same position they would be had they been subject to "reasonable" rates. To not allow cable operators to factor in equipment charges could result in an operator being required to make a rate reduction that is greater than the maximum reduction required under application of the benchmark approach. This analysis is consistent with our earlier statement that "the cable operator must make prospective billing adjustments to refund overcharges (and offset any undercharges) in a reasonable manner" (emphasis supplied).[62] This analysis also applies to unbundled charges where an operator was charging separately for program services and equipment but the rates did not comply with our rules (because, for example, the equipment rates were higher than actual cost). In this situation, the operator's overall refund liability will be calculated by adding the old charges together and comparing the total with the sum of the new, unbundled program service and equipment charges.

105. Refunds as Affecting Franchise Fee Liability. Section 622(b) of the Communications Act provides that "[f]or any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed five percent of such cable

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overage either through direct payment or as a credit to the subscribers' bills. Id. at 5727 n.378; 5866 *et. seq.* It is not clear what new issue or argument petitioner is attempting to raise. We believe that Rate Order provides sufficient flexibility for cable operators to give refunds in a variety of appropriate fashions, depending on the circumstances. Recognizing that identifying individual refund recipients may be difficult, we gave cable operators the option of granting a prospective percentage reduction to cover the cumulative overcharge. This reduction would be reflected in a one-time credit on prospective bills to the class of subscribers that had been unjustly charged or, to the extent an overcharge is associated with a separately priced tier of service, refunds should be made to the class of subscribers who receive that service.

[61] 47 C.F.R. § 76.942(a).

[62] Order in MM Docket No. 92-266 (released July 27, 1993), 58 F.R. 41042, 41044 n.21 (Aug. 2, 1993) (discussing this issue in the context of cable operators not being able to adjust their rates in time when the effective date of regulation was moved from October 1, 1993 to September 1, 1993).

operator's gross revenues derived in such period from the operation of the cable system." 47 U.S.C. § 542(b). Booth American Company notes that when a refund is ordered, a cable operator's gross revenue has been reduced, and that its franchise fee should be reduced proportionately. Petitioners request that the Commission modify its regulations to provide that any amount over the percentage of gross revenues that represents the franchise fee, calculated without including the amount of the refunds, should be returned to the cable operator.

106. We will grant petitioners' request, and amend Section 76.942 accordingly. To the extent that a franchise fee is calculated as a percentage of the cable operator's gross revenues and those revenues are reduced on account of refunds, the franchising authority must promptly return to the cable operator the amount that was overpaid as a result of the cable operator's newly-diminished gross revenues.[63]

107. Calculation of Refunds on Basic Rates. In the Rate Order and in subsequent orders addressing the effective date of rate regulation,[64] we indicated that cable systems would be subject to potential refund liability for the basic service tier as of the effective date of our rules, which we ultimately determined to be September 1, 1993. See *e.g.*, Rate Order, *supra* at 5725, 26.[65] On reconsideration, some municipalities argue that refund

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[63] With respect to money that constitutes a franchise fee overcharge resulting from a refund to subscribers pursuant to a rate-setting procedure, and thus owed by a franchising authority to a cable operator, the cable operator may deduct the amount from future franchise fees, rather than have the franchising authority return it in one immediate lump sum payment.

[64] As we have explained before, administrative difficulties necessitated deferral of the original June 21, 1993, effective date for rate regulation to September 1, 1993. See Order in MM Docket No. 92-266, FCC 93-304, released June 15, 1993, 58 F.R. 33560 (June 18, 1993); Order in MM Docket No. 92-266, FCC 93-372, released July 27, 1993, 58 F.R. 41042 (August 2, 1993). In all of these orders, we made clear that refund liability would begin as of the effective date of the rules.

[65] Our rules provide that an operator's liability for refunds for basic tier rates is limited to a one-year period, except in cases where an operator fails to comply with a valid rate order issued by a franchising authority or the Commission. In such cases, the operator can be held liable for refunds commencing from the effective date of the order until such time as the operator complies with the order. In all other cases, the refund period shall run as follows: (1) from the date the operator implements a prospective rate reduction back in time to the effective date of the rules, or one year, whichever is shorter; or (2) from the date a franchising authority issues an accounting order, and ending on the date the operator implements a prospective rate reduction ordered by a franchising authority, then back in time from the date of the accounting order to the

liability for the basic service tier should extend back to the effective date of the rules we announced originally, June 21, 1993. They contend that an extended refund period is more consistent with the intent of Congress and is more beneficial to consumers.

108. We decline to extend the refund liability for the basic service tier back to June 21, 1993, for several reasons. First, as a legal matter, we doubt that we may extend cable operators' refund liability back to a date before the rate regulations became effective. Operators at that time were not governed by any formal authority that would have defined their regulatory obligations (*i.e.*, including any recordkeeping or administrative matters that would facilitate the refund process).[66] Second, as a practical matter, setting the refund liability date at a date 2 1/2 months prior to the effective date of the rules would present significant recordkeeping and administrative problems that make the approach unworkable. Third, we believe our decision to adopt a September 1, 1993, date for refund liability satisfies the intent of Congress, which was most recently expressed in the Conference Report accompanying the Commission's 1993 supplemental appropriation to implement the 1992 Cable Act. Specifically, the Conference Report stated:

> [T]he conferees intend that the Commission shall establish a date as soon as possible after enactment of this Act, but that date shall be no later than September 1, 1993, as the date from which consumers may obtain refunds of excessive rates for the basic service tier of cable television service and for cable programming services.[67]

Thus, a September 1 refund date was clearly contemplated as reasonable by Congress.

109. Therefore, we will maintain September 1 as the earliest date for refund liability to begin. We also note that by our advancement of refund liability from October 1, 1993, to September 1, 1993, in conjunction with our adoption of that earlier effective date for our rules, consumers will realize greater savings through refunds to an earlier time than the municipalities contemplated when filing their petitions. Any refund liability for this period will be based, of course, on the rate-setting rules and formulas in effect at that time. The new rate-setting rules adopted in the companion Second Order on Reconsideration will be applied prospectively only. The new rules will determine future rates and refund liability only after the effective date of those rules.

110. Calculation of Refunds on Cable Programming Service Complaints. Section

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effective date of the rules, or one year, whichever is sooner. See 47 C.F.R. § 76.942 (b) and (c). The effect of these provisions is that refund liability cannot extend back before the effective date of our rate rules.

[66] See generally Bowen v. Georgetown University Hospital, 488 U.S. 468 (1988).

[67] House Report at 40.

623(c)(1)(C) of the Communications Act, 47 U.S.C. 543(c)(1)(C), requires the Commission to establish procedures (1) to reduce rates for upper tier services that the Commission determines to be unreasonable and (2) to refund overcharges paid by subscribers after the filing of a complaint that the Commission determines to have merit. In the Rate Order, we established that under our refund procedures the cumulative refund due subscribers would be calculated from the date a valid complaint is filed until the date a cable operator implements the reduced rate prospectively in bills to subscribers. Id. at 5865.[68]

111. On reconsideration, Time Warner requests that we revise our cable programming services refund procedures to impose a one-year limitation similar to the time restriction imposed on basic rate refunds. Thus, under Time Warner's proposal, a cable operator would be liable for refunds on initial rates from the date the complaint is filed until the Commission's decision ordering the refund, or for a one-year period prior to that decision, whichever is shorter. Additionally, Time-Warner seeks a six-month time limit on refund liability pursuant to a complaint on rate increases.

112. Time Warner argues that under the existing approach cable operators could face contingent liability for refunds for an unreasonably long period because the Commission could take years to resolve rate complaints. According to Time Warner, no matter what the final outcome of a complaint, this contingent liability will adversely affect the cable operator's ability to secure or maintain financing arrangements. Time Warner asserts that lenders are less likely to fund cable operators, or may require additional security and/or a higher rate of interest, if the operator faces potential refund liability that could languish for years at the Commission.

113. Furthermore, Time Warner believes, consumers would benefit from the Commission imposing a time limit on cable programming service tier refund liability. Such a limit, states Time Warner, would encourage the Commission to resolve rate complaints on a more timely basis, thus providing quicker relief for subscribers than under the current rules. Time Warner contends that timely resolution of refund claims would also reduce the operator's administrative burden of locating subscribers, which furthers the Commission's preferred remedy of granting a direct refund to those subscribers affected by the unreasonable rates.

114. We will not adopt a time limit on refund liability for unreasonable cable programming service tier rates. We believe our refund procedures for the cable programming service tier accurately reflect the mandate of Congress, which is to reimburse subscribers for unreasonable rate payments that occur while a complaint is pending before the Commission. Specifically, the Act directs the Commission to establish procedures to be used "to refund such portion of the rates or charges that were paid by subscribers after the filing of such complaint and that are determined to be unreasonable." See 47 U.S.C. § 543(c)(1)(C) (emphasis added).

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[68] We further provided that refunds would include interest computed at applicable rates published by the Internal Revenue Service for tax refunds and additional tax payments. Also, interest would accrue from the date a valid complaint is filed until the refund issues. Rate Order, *supra*, at 5867. See also 47 C.F.R. § 76.961(a)-(d).

Additionally, in the House Report, Congress explained that this subsection "ensures the consumer's right to a refund for unreasonable rate payments between the filing of a rate complaint and the determination that the rate is unreasonable." House Report at 88. That explicit statutory authority and legislative history indicates that Congress did not contemplate placing a cap or time limit on cable programming service refund liability. Indeed, Congress clearly intended that consumers be made whole for the charging of unreasonable cable programming services rates during the pendency of the complaint.

115. We are also unpersuaded that the amount of contingent liability cable operators might face as a result of pending cable programming service rate complaints will seriously harm the industry's ability to raise capital and borrow money. Time-Warner has not shown how outstanding contingent liabilities in specific situations have actually stymied the ability of any cable operator to attract investors or obtain capital, and has not convinced us that the degree of contingent liability potentially involved in such cases is more burdensome or problematic than that which it faces in other contexts.[69]

116. As for influencing the disposition of rate cases before the Commission, we intend to devote substantial resources to disposing of rate cases as promptly as possible, irrespective of any external time constraints. Imposition of such a limit would unfairly deprive consumers of their full rights in those cases which might defy prompt resolution by us. While it is indeed desirable to grant refunds to the parties overcharged, operators' difficulty in so doing after one year is not sufficient reason to deprive the majority of customers of any refunds due to the operators' overcharging for cable service and to permit the operator to keep the proceeds of such overcharging.

117. We note also that our rationale for adopting a one-year cap on a cable operator's refund liability for the basic service tier does not support adoption of similar limit in the cable programming services refund context. We adopted a one-year limit in the basic service context because franchising authorities might not assert jurisdiction over rates, or even seek certification, until some time in the future. Cable operators cannot reasonably be exposed to refund liability for an indefinite period that could last up to several years and cover a period during which the franchising authority saw no need to regulate rates and the operator need not have anticipated oversight of its uncontested rates or the need to justify them at a later date. Franchising authorities must assume some measure of responsibility for prompt action to assert jurisdiction over rates they believe may be unreasonable. Moreover, the calculations themselves would get extremely complex and burdensome as unregulated rate changes begin to accrue over any period greater than a year. Any refunds of cable programming service tier rates, however, will date back to a date certain, from which time the cable operator was explicitly advised that its rates were under regulatory scrutiny. Moreover, the refund liability period will be limited, effectively, to the time period of the rate proceeding itself, and any shorter refund liability would provide an incentive for cable operators to unduly complicate, or otherwise engage in stalling tactics in the

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[69] For example, cable systems must regularly face contingent liabilities that result from pending lawsuits. Such liabilities can obviously remain outstanding for years until they are finally resolved through litigation.

course of the rate-setting proceeding.

E. Cable Programming Service Complaint Process.

118. Effective Date of Cable Programming Service Regulation. Several municipalities request that the Commission determine that regulation of cable programming services commences on the date the Commission's regulations take effect, rather than on the date a complaint is filed. We decline to do so. First, we note that Congress intended regulation of cable programming services to be complaint-driven (see 47 U.S.C. §§ 543(c)(1)(B) and 543(c)(3)). The Commission cannot act on cable programming service tier rates until a complaint is filed. Second, insofar as the petitioners are suggesting that the Commission should calculate refund liability back to the effective date of our regulations, Section 623(c)(1)(C) of the Act prohibits the Commission from doing so.[70]

119. NATOA also requests that the Commission grandfather cable programming service complaints filed within 180 days of the effective date of the Commission's regulations for purposes of permitting additional rate decreases after expiration of the 180-day period. NATOA argues that such a provision is necessary to ensure that complainants filing during the 180-day period receive the full reduction in rate to which they are entitled. NATOA's argument references the Commission's prior statement that we would "seek to refine our analysis through further industry surveys and order additional rate reductions if appropriate." Rate Order at 5644.

120. We have decided that complaints that are filed before the effective date of the revised rate regulations adopted in the Second Order on Reconsideration, will be adjudicated as follows: Refunds for the time period in which the old rules were in effect will be based on the old rules, while refunds for the time period in which the new rules are in effect will be based on the new rules. (See discussion at para. 110, *supra*). This approach will achieve for ratepayers the maximum possible benefit from our revised rules consistent with the general prohibition on retroactive rulemaking.[71]

121. Section 623(c)(3) of the Act directs that complaints must be filed "within a reasonable period of time following a change in rates that is initiated after that effective date, including a change in rates that results from a change in that system's service tiers." 47 U.S.C. § 543(c)(3). In the Rate Order, we interpreted that provision to require complainants to file such

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[70] Section 623(c)(1)(C) requires the Commission to establish procedures for the refund of such portion of the rates paid by subscribers after the filing of a complaint that are found to be unreasonable. 47 U.S.C. § 543(c)(1)(C)("the Commission shall . . . establish . . . the procedures to be used to . . . refund such portion of the rates or charges that were paid by subscribers after the filing of such complaint that are determined to be unreasonable.")

[71] See Bowen v. Georgetown University Hospital, 488 U.S. 468 (1988).

complaints within 45 days from the time a subscriber receives a bill from the cable operator that reflects the rate increase. Rate Order, *supra*, at 5840 (emphasis supplied). We clarify that a subscriber may file a complaint any time there is a rate change, including an increase or decrease in rates, or a change in rates that results from a change in a system's service tiers. See 47 U.S.C. § 543(c)(3). Such rate changes may involve implicit rate increases (such as deleting channels from a tier without a corresponding lowering of the rate for that tier).[72] As we stated in the Rate Order, the triggering mechanism for the filing of the complaint will be a reflection of any rate change on a subscriber's monthly bill. Id.[73]

IV. PROVISIONS APPLICABLE TO CABLE SERVICE GENERALLY

122. Introduction. The Rate Order set out a number of regulations generally applicable to all cable systems. These include provisions governing negative option billing practices, prevention of evasions, grandfathering of rate agreements, subscriber bill itemization, advertising of rates, and effective date. Petitioners have challenged and/or sought clarification of the provisions governing evasions, grandfathering of rate agreements, subscriber bill itemization, and the effective date of the rules, and these are discussed below.

A. Negative Option Billing Practices

123. Section 3(f) of the 1992 Cable Act provides:

> A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment.[74]

Unlike other subsections of Section 3, this provision does not specifically delineate the jurisdictional role, if any, of state and local governments in addressing negative option billing practices of cable operators.[75] Language in previous decisions in this proceeding has created confusion concerning this issue. Based on our careful examination of the 1992 Cable Act and its

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[72] See discussion of implicit rate increases in Rate Order at 5917.

[73] We amend § 76.953(b), accordingly, to reflect this clarification.

[74] Communications Act, Section 623(f), 47 U.S.C. Section 543(f).

[75] Compare Section 3(f) with Section 3(a)(2), (3), providing that local franchising authorities may obtain jurisdiction to regulate basic service tier rates upon certification by the Commission. Communications Act, § 623(a)(2), (3), 47 U.S.C. § 543(a)(2), (3).

legislative history, as discussed below, we conclude that the Commission as well as state and local governments have concurrent jurisdiction to regulate negative option billing.

124. In the Rate Order the Commission addressed in footnote 1095 an argument by municipalities that state and local governments should have concurrent enforcement powers over negative option billing practices. In response, we stated that "[w]e do not preclude state and local authorities from adopting rules or taking enforcement action relating to basic services or associated equipment consistent with the implementing rules we adopt and their powers under state law to impose penalties."[76] Similarly, on reconsideration we reaffirmed our prior determination in the Rate Order that Section 3(b)(7) of the 1992 Cable Act, which establishes the minimum contents of the basic service tier, preempts franchise agreements that purport to require cable operators to provide basic tier services beyond the statutory minimum requirements.[77] In discussing the basic service tier definition, we stated in footnote 127:

> We similarly affirm that franchising authorities may not regulate tier restructuring in a manner that is inconsistent with the 1992 Cable Act. See Communications Act, Sections 623(a)(1), (f), 47 U.S.C. Sections 543(a)(1), (f). In particular, local authorities are precluded from regulating negative option billing to prevent tier restructuring regardless of how the local requirement is characterized. The Commission has ruled that cable operators may engage in revenue-neutral tier restructuring without violating the negative option billing procedure.[78]

125. These two brief statements did not specifically mention preemption nor were they accompanied by any preemption analysis. Nevertheless, our footnotes may be construed as attempting to preempt states and local franchising authorities from regulating negative option billing in a manner inconsistent with our rate regulation rules generally and our specific rule addressing negative option billing.[79] In fact, we understand that the possible preemptive effect of these statements is at issue in at least two pending lawsuits in federal district courts.[80]

126. Accordingly, on reconsideration on our own motion, we examine in greater detail whether, and under what circumstances, state and local governments have authority to regulate negative option billing practices of cable operators. As discussed below, we conclude that the 1992 Cable Act permits state and local governments to employ state or local consumer protection laws to regulate negative option billing. State and local government jurisdiction to regulate

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[76] Rate Order, 8 FCC Rcd 5905 n.1095.

[77] First Rates Reconsideration, *supra*, at paras. 78-86.

[78] Id. at 46 n.127 (internal citation omitted).

[79] See 47 C.F.R. § 76.981.

[80] See Time Warner Cable v. Doyle, Case No. 93 C 0633C (W.D. Wis.); Mauldin v. Time Warner Entertainment Co., L.P., Case No. 93-977-CIV-94L-19 (M.D. Fla.).

negative option billing under consumer protection laws is concurrent with the Commission's jurisdiction to regulate negative option billing under the Communications Act. Therefore, based on our close examination of the preemption issue in this order, we hereby substitute the following analysis in place of the two statements in our previous orders noted above.

127. The negative option billing provision appears in Section 3 of the 1992 Cable Act, the section of the statute governing rate regulation. Unlike most of the other provisions of Section 3, however, the negative option billing provision is not limited in its application to those cable services and cable operators subject to rate regulation. Rather, the unqualified negative option billing prohibition applies to all cable services offered by all cable operators, regardless of whether the operators are subject to effective competition.[81] Moreover, unlike many other provisions of the 1992 Cable Act, the negative option billing provision does not specifically direct the Commission to adopt implementing rules,[82] nor does it specifically vest jurisdiction in the Commission to enforce the provision to the exclusion of state and local governments.

128. While the negative option billing provision is codified in Section 3 governing rate regulation, it appears that it is more in the nature of a consumer protection measure rather than a rate regulation provision per se. In this regard, the negative option billing provision governs the circumstances under which a cable operator may bill a subscriber for a particular service, rather than the reasonableness of the actual rate charged a subscriber for that service.[83] Thus, Section 8

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[81] The legislative history supports this conclusion. Conference Report at 65 (the prohibition covers, *inter alia*, "individually-priced programs or channels" that are not subject to rate regulation under the 1992 Cable Act); 138 Cong. Rec. S567-68 (daily ed. Jan. 29, 1992) (remarks of Sen. Gorton, sponsor of the provision).

[82] Of course, the Commission has authority to adopt rules to implement the negative option billing provision of the 1992 Cable Act under its general rulemaking power under Sections 303(r) and 4(i) of the Communications Act. Section 303(r) authorizes the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act... ." 47 U.S.C. Section 303(r). Likewise, Section 4(i) provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. Section 154(i). In contrast, as discussed below, state and local government authority to regulate negative option billing does not derive from the 1992 Cable Act or the Communications Act, but rather from state or local consumer protection laws.

[83] The legislative history supports this interpretation. In offering the negative option billing amendment to the Senate cable bill that ultimately became Section 3(f) of the 1992 Cable Act, Senator Gorton referred to negative option billing as a

of the 1992 Cable Act regarding consumer protection is relevant to the preemption analysis. Section 8(c)(1) provides that "[n]othing in this title [Title VI] shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title."[84] Therefore, given that Section 3(f) appears to be a consumer protection measure, unless "specifically preempted" elsewhere in Title VI, Section 8(c)(1) preserves the ability of a state or local government to exercise any authority it may have under state or local consumer protection laws to regulate negative option billing.[85]

129. We find nothing in Title VI that specifically preempts state or local regulation of negative option billing. There is nothing in the language of Section 3(f) or its legislative history to suggest that the Commission has exclusive jurisdiction over negative option billing or that state and local governments are precluded from addressing such practices. Indeed, in proposing the negative option billing prohibition, Senator Gorton referred to the efforts of state attorneys general in this area.[86] Given congressional recognition of the states' role, it seems reasonable to

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consumer protection issue rather that a rate regulation issue. Specifically, he referred to negative option billing as a "marketing ploy" and said that the provision would make sure that the public is not "duped into paying for any cable service program, service, equipment or anything else, without consciously knowing they are purchasing that service and making a decision to do so." 138 Cong. Rec. S567-68 (daily ed. Jan. 29, 1992) (remarks of Sen. Gorton). Cf. Cable Television Ass'n. of New York, Inc. v. Finneran, 954 F.2d 91 (2d Cir. 1992) (holding that rates charged by cable operators to subscribers wishing to downgrade to a less expensive tier of service are not "rates for the provision of cable service" under the 1984 Cable Act).

[84] Communications Act, Section 632(c)(1), 47 U.S.C. Section 552(c)(1).

[85] The Conference Committee adopted the House version of the consumer protection and customer service provision (see Conference Report at 79), so language from the committee report accompanying the House bill that describes this provision is relevant legislative history. That report states:

> [This subsection] makes it clear that nothing in this Title is intended to interfere with the authority of a state or local governmental body to enact and enforce consumer protection laws, to the extent that the exercise of such authority is not specifically preempted by this Title. In adopting this provision, the Committee intends that state and local authorities retain all authority to enact and enforce consumer protection laws that they have under current law.

House Report at 105-106.

[86] 138 Cong. Rec. S567-68 (daily ed. Jan. 29, 1992).

assume that if Congress intended to supplant state or local efforts in this area, it would have said so specifically.

130. Therefore, reading Sections 3(f) and 8(c)(1) of the 1992 Cable Act together, we conclude that the Commission as well as state and local governments have concurrent jurisdiction to regulate cable operators' negative option billing practices. Our general rulemaking power under Sections 303(r) and 4(i) of the Communications Act authorizes us to adopt rules to implement Section 3(f) of the 1992 Cable Act regarding negative option billing. States and local franchising authorities, by virtue of the preservation of authority under Section 8(c)(1) of the 1992 Cable Act, may regulate negative option billing practices of cable operators to the extent authorized under state or local consumer protection laws.

131. Consistent with this view, we believe that the 1992 Cable Act generally does not preempt state and local governments from regulating negative option billing practices of cable operators under state or local consumer protection law. We note, however, that Section 3(a) of the 1992 Cable Act provides that states and franchising authorities may regulate "the rates for the provision of cable service" only to the extent provided by the statute in accordance with rules established by the Commission.[87] As explained above, we believe that in typical circumstances regulation of negative option billing does not implicate "rates for the provision of cable service," but rather simply addresses billing practices of cable operators, activity which seems more in the nature of consumer protection than rate regulation. Therefore, we conclude that Section 3(a) of the 1992 Cable Act generally does not "specifically preempt" state and local governments from enacting and enforcing state or local consumer protection laws that may address negative option billing practices of cable operators. Should we become aware of a particular situation, (*e.g.*, through a petition for declaratory ruling), in which state or local regulation of negative option billing goes beyond consumer protection and instead approaches actual regulation of "rates for the provision or cable service," or otherwise goes beyond consumer protection law, we will consider the question of federal preemption in that specific factual context.

B. Prevention of Evasions.

132. The 1992 Cable Act requires the Commission to establish and periodically review regulations to prevent evasion of the rate regulations, including evasion resulting from retiering. 47 U.S.C. § 543(h). The Rate Order defined a prohibited evasion as "any practice or action which avoids the rate regulation provision of the Act or Commission rules contrary to the intent of the Act or its underlying policies." Rate Order at 5915. The Commission generally opted for a case-by-case approach and declined to delineate specific actions that might constitute evasion.

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[87] Communications Act, §§ 623(a)(1), (2)(A), (3)(A), 47 U.S.C. §§ 543(a)(1), (2)(A), 3(A). See also § 623(b), 47 U.S.C. § 543(b) (Commission directed to prescribe regulations to ensure that rates for the basic service tier are reasonable).

Id.[88]

133. Various petitioners urge the Commission to classify certain practices as evasions or to declare that certain actions will not be deemed evasions. In the Rate Order, we stated our belief that it would be virtually impossible to list every potentially evasive practice or to determine that a practice constitutes evasion in the absence of a specific factual context, while expressing our expectation that evasions would be remedied by this Commission and local franchising authorities. Id. at 5915, 5916. While we still may be unable to list all prohibited practices at this time, certain patterns of conduct have emerged since the adoption of the rate regulations that we can characterize as creating, under certain circumstances, a possible evasion of the rate regulation rules. For example, moving groups of programming services that were offered in tiered packages to *a la carte* packages may be considered, in certain circumstances, an attempt to avoid the rate regulation of those services that had traditionally been offered to customers as part of the programming package intended for regulation by Congress. Such practices may not, depending on the particular circumstances, provide subscribers with the realistic option to purchase unregulated channels on an individual basis, a requirement set forth in the Rate Order.[89] Generally, as discussed in further detail in the Second Order on Reconsideration at Section II C ("*A la carte* packages"), collective offerings of otherwise exempt per channel or per program services will not be considered an evasion if (1) the price for the combined package does not exceed the sum of the individual charges for each component of service, and (2) the cable operator continues to provide the component parts of the package separately (which requirement will be met if the *a la carte* offering constitutes a realistic service choice).[90]

134. Collapsing multiple tiers of service into the basic tier of service, which ultimately eliminates the service choice previously available to customers and that raises the price of cable service for all basic tier subscribers may also be considered an evasion by circumventing the rules intended to reduce the cost of cable service and to provide for the buy-through of only desired services. Upon receipt of a complaint on any potential evasion, we will consider, *inter alia*, such circumstances as the timing of the cable operator's actions (*e.g.*, whether they occurred on the eve of regulation or in response to the filing of a complaint), the price to subscribers before and after the actions, a comparison of the level of service received by the

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[88] In the Rate Order, the Commission did cite three practices that, if established by the evidence, would constitute evasions. This list, however, was not meant to be an exhaustive delineation of rate regulation evasions, but rather was to serve as the foundation for developing policies in this area. Rate Order at 5917.

[89] Id. at 5837, n. 808.

[90] See also interpretive guidelines on whether collective offerings of *a la carte* channels should be accorded regulated or nonregulated treatment, as discussed in Second Order on Reconsideration at Section II C. As noted therein, packages of *a la carte* channels offered prior to April 1, 1993, will be accorded nonregulated treatment.

subscriber before and after the cable operator's actions, and whether the action resulted in the avoidance of the tier buy-through prohibition.[91] Practices that have the effect of increasing subscriber choice and/or reducing rates generally will not be found evasive of our rules.

135. Numerous other practices that have developed since the advent of rate regulation might also be found, depending on individual circumstances, to constitute evasions of the rules or to violate the rules themselves. For instance, operators cannot now charge for services previously provided without extra charge (*e.g.*, routine service calls, program guides) unless the value of that service, as now reflected in the new charges, was removed from the base rate number when calculating the reduction in rates necessary to establish reasonable rates. Also, a single channel provided to the customer that may consist of two or more programming services can be counted only as one channel of service provided for rate-setting purposes. Charging customers to downgrade from service packages that were added without their explicit consent, even where those service packages include previously subscribed services, may be a violation or an evasion of the negative option prohibition. In addition, the delivery of new packages themselves (ironically intended to represent subscriber choice) without an affirmative assent from the subscriber may be a violation or an evasion of the negative option requirements and result in a refund to the customer.[92] Adding previously unneeded equipment and charging for that equipment in order to provide customers with the same services they received previously may also be an evasion of our rules. Operators must realize that these and similar practices, and other practices which directly violate or evade our rules will not be permitted, and that sanctions will be imposed in appropriate circumstances.

136. We have now undertaken the first steps of an enforcement effort directed at specific practices by individual operators. The Commission has sent 62 letters of inquiry[93] to various cable operators, primarily in response to complaints from local governments and consumers about rate and service changes and certain other practices. The letters of inquiry generally require the operators to provide information on, and a justification for, recent rate and service changes and practices that were raised by the complaints. Principal subjects addressed in the letters of inquiry

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[91] The "price to subscribers" and "comparison of the level of service" for purposes of determining whether an operator's collective offering of *a la carte* channels should be accorded regulated or nonregulated treatment or will be considered an evasion will be evaluated within the context of the factors set forth in the Second Order on Reconsideration.

[92] See discussion at para. 124, *supra*.

[93] These letters, dated November 17, 1993, December 13, 1993, and February 22, 1994, and any responses are available for public inspection and duplication in Room 207, 2033 M Street, N.W., Washington, D.C. 20554. (The cable operators were given 30 days to respond to the letters.)

include: (1) possible violations of the Commission's freeze on regulated cable service revenues;[94] (2) the removal of programming from existing service tiers and the offering of such programming both on an individual or *a la carte* basis and on a collective or package basis; and (3) possible violations of the negative option billing prohibition.[95] We intend to pursue vigorously these and other appropriate enforcement actions in individual cases to bring the full measure of benefits of the 1992 Cable Act to cable subscribers where the purposes of the Act are being thwarted by the evasive or unlawful actions of cable operators.

C. Grandfathering of Rate Agreements.

137. The 1992 Cable Act's grandfather clause allows a franchising authority with a franchise agreement executed before July 1, 1990, that was regulating basic cable rates at that time to continue such regulation for the remaining term of that agreement without following the Commission's substantive rate standards. 47 U.S.C. § 543(j). The Commission limited this provision to its explicit terms. Rate Order, *supra*, at 5926.

138. King County contends that the grandfather clause should encompass all rate agreements whether executed before or after July 1, 1990 because such agreements may benefit franchising authorities, cable operators, and subscribers. King County's argument was considered and rejected in the Rate Order, where the Commission found that an expansive interpretation of the grandfather clause conflicted with the literal terms of the provision and with the Cable Act's intent that local franchising agreements are abrogated unless they conform with the Act and the Commission's Rules. Id.[96] King County has presented no justification for departing from the literal terms, and the intent, of the Cable Act, and the interpretation set forth in the Rate Order stands.

D. Subscriber Bill Itemization.

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[94] See Freeze Order in MM Docket 92-266, 8 FCC Rcd 2921, 58 FR 17530 (April 5, 1993), clarified, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993), extended, FCC 93-304, 58 FR 33560 (June 18, 1993), extended, FCC 93-494, 58 FR 60141 (November 15, 1993), extended, FCC 94-33 (released February 8, 1994), 59 FR 6901 (February 14, 1994).

[95] 47 U.S.C. § 543(f); 47 C.F.R. 76.981.

[96] Several petitioners urge the Commission to expand the grandfather clause to encompass operator/MDU agreements and operator/franchising authority agreements that address issues other than rates, requiring, for example, provision of certain services on the basic tier. The first of these issues (operator/MDU agreements) is addressed at paras. 21-22, *supra*, and the grandfathering of operator/franchising authority agreements for the provision of certain services on the basic tier was addressed in the First Rates Reconsideration at paras. 78-86.

139. Special Taxes. The 1992 Cable Act allows a cable operator to separately identify certain charges on its bill, *i.e.* the amounts of the bill (1) assessed as a franchise fee (as well as the identity of the franchising authority); (2) assessed to satisfy any requirements the franchise agreement imposes on the operator for costs related to public, educational, or governmental (PEG) channels; and (3) attributable to charges a governmental authority imposes on the transaction between the operator and the subscriber. 47 U.S.C. § 542(c). The Rate Order limited the itemization provision to its express terms and found that itemized costs must be direct and verifiable,[97] as well as a reasonable allocation of overhead, and for PEG costs, the sum of the per-channel costs for the number of channels used to meet franchise requirements. Rate Order, *supra* at 5967, 68. The Rate Order also made clear that Section 622(c) does not require operators to undertake itemization of any costs. Id. at 5967. In the Rate Order, the Commission specifically determined that taxes imposed on rights-of-way and also applicable to other utilities would not be part of a franchise fee and thus could not be itemized, and specifically excluded from itemization California's possessory interest tax. Id. at 5968, n. 1399.

140. Several petitioners object to the Commission's exclusion from itemization of the California possessory interest tax and seek itemization for the California utility user tax, contending that both of these taxes are imposed on the transaction between the operator and subscriber and thus squarely within Section 622(c)(3), which allows itemization of charges imposed by a governmental authority on the transaction between operator and subscriber.[98] 47 U.S.C. § 542(c). The California possessory interest tax, InterMedia asserts, purports to be an assessment based only on the fair market rent for the use of the right-of-way but is applied differently to cable systems than to other businesses subject to the tax. It contends that in the cable context, the tax is not based on the value of the right-of-way itself, but on the system's profitability, which is derived from the transactions between the operator and subscribers. California Cable Television Association states that the utility user tax is assessed directly as a percentage of subscriber charges each month.

141. These arguments are essentially the same as those raised by the same parties in conjunction with our recent consideration of whether these same taxes should be afforded treatment as external costs when calculating permissible rates. See First Rates Reconsideration, *supra*, at paras. 103-107. Our analysis in the subscriber bill itemization context will be similar, as well. In considering the application of external treatments, the underlying consideration is the same as it is in determining eligibility for itemization on subscriber bills: whether the particular levy is a tax on the transaction between the operator and subscriber. Compare 47 U.S.C. § 543(b)(2)(C)(v) with § 542(c)(3). With the same record before us as here, we have already found ourselves unable to conclude that the California possessory interest tax is, in every

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[97] The House Report states that a cable operator shall itemize "only [the] direct and verifiable costs" associated with the categories of costs the Act specifies and should "not include in itemized costs indirect costs." House Report at 86.

[98] Whether these taxes can be afforded external treatment was discussed in the First Rates Reconsideration, *supra*, at paras. 105-107.

instance, the type of tax that would fit within this characterization. Id. at para. 106. We found that with varying applications of the tax in different jurisdictions within California, different treatments under our rules would pertain from case to case. Where the assessment of the possessory interest tax is directly related to subscriber revenues, such as where the tax is based on a value of intangible assets formula effectively calculated from the operator's income for the provision of cable service, then it could be accorded external cost treatment, and it similarly would be eligible for itemization on subscriber bills. Id. at para. 107. Otherwise it is eligible for neither treatment. As we stated in that earlier decision, we are prepared to afford utility user taxes in California, or any other jurisdiction, the requested treatment if additional evidence regarding their application in specific instances demonstrates such treatment is warranted under this analytical framework.

142. Advertising of Rates. Several petitioners object to the Commission's prohibition on advertising prices for cable service that do not include the amount of franchise fees. Rate Order, *supra* at 5972, n. 1415. Petitioners argue that this decision will require many different prices to be quoted for a system serving multiple franchise areas, thus hindering cross-franchise area marketing efforts. Petitioners dispute the Commission's assertion that allowing operators to advertise a rate for service "plus franchise fees" would confuse subscribers about the cost of cable service, contending that goods are often marketed at a price exclusive of applicable taxes and/or shipping charges.

143. We remain concerned that consumers could be misled as to the cost of cable services by advertisements which do not include complete rates, and cable operators will generally be required to advertise rates that include all costs and fees. However, in those cases where a system covers multiple franchise areas that have differing franchise fees or other franchise costs, different channel line-ups, or have slightly different rate structures, an operator should be permitted some flexibility for efficient advertising that will reasonably advise potential subscribers of the true cost of service. In such circumstances, an operator can advertise a range of fees, or a "fee plus," rate that indicates the core rate plus the range of possible additions, based on the particular location of the subscriber.[99] An operator need not indicate the total rate for each individual area in such circumstances.

144. Itemization of "Franchise Related" Costs. NATOA urges clarification of the decision to allow itemization of costs required under a franchise agreement for "support of institutional networks, free wiring of public buildings, provision of special municipal video services and voice and data transmissions." Id. at 5967-69. NATOA contends that such costs cannot be considered "franchise fees" within the definition of Section 622(g). Petitioner does not seem to raise any arguments that PEG-related costs cannot be itemized at all under Section 622(c), and the costs to which it refers, essentially costs to support PEG-related activities, are specifically provided for in subpart (2) of Section 622(c). We believe that these

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[99] For instance, an advertisement might declare that basic service is $14.00 per month plus a franchise fee of 28¢ to 70¢, depending on location, or that it is $14.28 to $14.70, depending on location.

costs are properly classified as PEG-related and are therefore itemizable under Section 622(c)(2).

E. Effective Date.

145. In the Rate Order, we announced an effective date of June 21, 1993, for the rules adopted in that decision. Rate Order, *supra*, at 5932-33. Subsequently, after examining the feasibility of implementing cable rate regulation in light of the Commission's funding shortfall for Fiscal Year 1993, the effective date was deferred until October 1, 1993.[100] On June 30, however, the Congress appropriated supplemental funding, and the accompanying Conference Report expressed the intent of Congress that the Commission establish an effective date of September 1. The Commission then established September 1, 1993, as the effective date for the rate regulation rules, and provided certain mechanisms to facilitate a smooth transition.[101]

146. In its petition for reconsideration, Wometco urges the Commission to delay the effective date at least 60 days beyond the completion of the reconsideration process and any further rulemakings implementing the 1992 Act's rate regulation provisions. Wometco argues that this 60-day period is necessary for affected parties to become familiar with the Commission's final decisions. Since our rules went into effect on September 1, Wometco's petition to delay the effective date is moot.

V. EQUIPMENT AND INSTALLATION

147. In the Rate Order, we established standards for the regulation of equipment and installation charges for basic cable and cable programming services based on actual cost. Cable operators are required to unbundle each piece of equipment and must separate equipment from installation. They must establish an Equipment Basket that includes all costs associated with the equipment for and installation of regulated cable service. FCC Form 393 (and/or FCC Form 1205) provides the methodology and guidelines for determining the actual cost of each piece of equipment and of installations. Id. at 5815-16. In the First Rates Reconsideration we responded to petitions concerning: (1) the equipment covered by basic service regulation; (2) the application of the actual cost standard; (3) additional connections; and (4) most of the issues raised regarding the guidelines for determining equipment and installation charges. First Rates Reconsideration, *supra*, at paras. 37-69. Here we consider several remaining issues, including the treatment of the cost of promotions, seasonal property related charges, the methodology for determining the cost of home wiring and other issues concerning our Equipment Basket approach.

A. Promotions.

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[100] Order, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993)(deferring the effective date until October 1, 1993).

[101] Order, FCC 93-372 (released July 27, 1993), 58 FR 41042 (August 2, 1993) (moving forward the effective date from October 1, 1993, to September 1, 1993).

148. In the Rate Order we stated that operators would be afforded substantial discretion to offer promotions, including a below cost offering for some equipment and installations. Id. at 5819, 20. Additionally, we stated that certain limits would apply. Id. at 5820-21. Consistent with these statements, Section 76.923(j) of our rules allows promotions but limits the recovery, stating: "Operators may not recover the cost of promotional offerings by increasing program service rates above the maximum monthly charge per subscriber prescribed by these rules." Although the rules do not state how in the normal course of setting rates such recovery is to be effected, they do allow that "as part of a general cost-of-service showing, an operator may include the cost of promotions in its general system overhead costs."[102]

149. Petitioners claim that the FCC Form 393 methodology (which is also employed on FCC Form 1205) does not allow for recovery of past costs associated with equipment and installation promotions. In many cases equipment and installations have been provided to customers "free" in the past with the expectation of recovering such costs over time in the rates for services. Since the required calculations remove the full cost of equipment and installations from the benchmark rate calculations, operators claim that they will not be able to recover such past promotional costs as planned. Further, they claim that they will be able to recover the full cost of future equipment and service installations only by discontinuing promotional offerings.

150. We do not agree with petitioners that our rules do not allow for the recovery of costs of equipment and installations provided to customers free or at reduced rates for the purpose of promoting services. Our rules allow operators to recover all of their equipment and installation costs in the charges for those items if they so wish. Further, we expect that the benchmark rates already reflect an element of promotional costs because, prior to the inception of benchmark rates, it has been fairly routine in the cable industry to periodically run promotional offerings to entice customers to purchase cable services. Considering this, we believe that we have already adequately provided for the recovery of promotional offerings when setting the benchmark rates themselves. To the extent that this does not apply to any operator, that operator may attain recovery, if justified, by making a cost-of-service showing. In such case, the costs of promotional offerings may be included, pursuant to Section 76.924, in general system overheads. We will, however, continue to monitor this issue. If we find that over time there is evidence that such costs have not been adequately provided for under our existing approach, we will consider any appropriate revisions to our rules or policies at that time.

B. Seasonal Property Related Charges.

151. Baraff Koerner and Higgins Lake claim that the benchmark design did not adequately consider companies with extraordinary churn associated with seasonal property. They claim that since the benchmarks did not include revenues for seasonal connect, disconnect, and maintenance orders, the elimination of the associated seasonal costs results in the elimination of an amount that was not included in the benchmarks. Some operators experience seasonally high maintenance costs associated with the need to turn service on and off at the beginning and end of the season for resort properties. Others provide special maintenance at a special fee that allows

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[102] 47 C.F.R. § 76.923(j).

seasonal subscribers to avoid the inconvenience of having to disconnect and reconnect at the end and beginning of each season. Petitioners claim that since the benchmark compilations did not include revenues for the seasonal items, the elimination of the seasonal related costs results in the elimination of an amount that was not included in the benchmarks. They claim that the treatment of the revenues for seasonal items needs to be clarified or that some consideration should be given to the seasonal issue by making some special allowance for the fact that seasonal churn is not built into the compiled benchmarks.

152. We do not find that provision should be made for such operators to allow the rates for service to remain higher than average by allowing the cost for the seasonal turn-on and turn-off to remain in the rates for programming service. First of all, these operators are allowed to include the revenues from seasonal orders in their benchmark calculations of rates per channel in effect on September 30, 1992 and on the initial date of regulation.[103] They eliminate the associated costs in determining the maximum allowable rates because these costs are recoverable from separate rates for equipment. If seasonal operators wish to provide special charges for seasonal connect/disconnect services or for off-season maintenance, they may calculate rates for such on Line 7.e of Form 393, Part III (or Line 7.e Step B, Equipment and Installation Worksheet, FCC Form 1205), in accordance with our rules.

153. It should also be noted that the benchmark rates are essentially average rates and as such will not precisely consider every operational factor of each individual cable operator. In the Rate Order, we noted that we originally solicited comment on the specific system characteristics or variables that we could or should use to separate systems into distinct categories for which we should establish different benchmarks and/or define different rates. Id. at 5767-68. We did not find seasonality to be a factor requiring special consideration. Nor is it a statistically significant factor in setting rates under our revised benchmark analysis. Accordingly, we will not modify our equipment rules or rate-setting rules based on seasonal changes.

C. Sale of Home Wiring.

154. The Commission requires that upon termination of service, home wiring must be offered for sale to subscribers. Such wiring is to be priced at the replacement cost of the installed material on a per foot basis.[104] NATOA claims that a schedule is needed for calculation of the charges allowable for home wiring sold to cable customers.

155. There is currently no required schedule for any equipment sold. Requirements for pricing of equipment leased involves calculation of a ratebase type of profit element, allocation of overheads, inclusion of depreciation on equipment leased, and the estimation of the maintenance element includible in the equipment charges. Considering the requirements for equipment pricing, we provided schedules to guide operators in calculating rates. These schedules also

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[103] 47 C.F.R. § 76.922.

[104] See Report and Order in MM Docket No. 92-160, 8 FCC Rcd 1435, 1437 (1993), petitions for recon. pending. See also Communications Act, § 624(i); 47 U.S.C. § 544(i).

documented the rate calculations for review by regulating authorities. Equipment sold is less involved and does not require the level of monitoring that equipment leased does. It is not, therefore, necessary to provide the kind of guidance for pricing computation and documentation. While the home wiring is somewhat unique in that there is a special requirement for sale upon service termination, the pricing for the sale of home wiring does not appear to be any more complicated than the sale of other regulated equipment.

156. We do not find that it has been demonstrated that a significantly unique and complicated situation prevails for pricing of home wiring and consequently that a special form is needed. We thus will not impose the additional burden of a special schedule for home wiring. Nevertheless, we clarify that adequate documentation should be maintained to demonstrate compliance with Commission pricing requirements for home wiring as well as for other equipment sold and for installations.

D. Time Lag.

157. In the Rate Order, the Commission directed operators to establish an equipment basket for accumulation of equipment and installation costs but did not establish the time periods for measuring equipment basket costs. Rate Order, *supra*, at 5815-16. The FCC Form 393 and related instructions, however, generally require inclusion of historical costs rather than historically-based projected costs. With respect to this, Time Warner states that the equipment basket approach is flawed because it has a built-in time lag that effectively does not allow costs incurred in a given year to be recovered until the following year. This is because the actual costs of the year ending are used for the development of rates for the upcoming year instead of projected costs. Petitioner claims that this particularly penalizes systems with unusually high installation expenses arising from high levels of new construction. The petitioner contends that systems that have, for example, recently installed many new subscribers or have added addressable converters will have to back out these high costs from their program service rates, even if they intended to recover such costs gradually over time. Petitioner recommends that cable operators be permitted to use *pro forma* expense figures averaged over the life of the franchise instead.

158. We believe our methodology, as modified on reconsideration, will allow recovery of unusually high costs. We have provided a methodology that eliminates the cost of equipment from service rate calculation because there is a provision to calculate separate rates for installations and equipment. Further, we have clarified in the First Rates Reconsideration that adjustments for unusual changes in operations are permitted, subject to regulatory approval, by using a representative month for developing equipment rates. First Rates Reconsideration, *supra*, at para. 67. See also FCC Form 1205, General Instructions. We believe that this provision will allow operators to recover the full cost of equipment and we are denying Time Warner's request to use *pro forma* expense figures averaged over the life of the franchise.

VI. ORDERING CLAUSES

159. Accordingly, IT IS ORDERED that Part 76 of the Commission's rules, 47 U.S.C. Part 76, IS AMENDED, as indicated below, May 15, 1994.

160. IT IS FURTHER ORDERED that the Petitions for Reconsideration ARE GRANTED in part, DENIED in part, as indicated above, and to the extent that Petitions raise issues concerning leased access rates, they will be disposed of in future orders.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Part 76 of Title 47 of the Code of Federal Regulations is amended to read as follows:

Part 76 Cable Television Service

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 552 as amended, 106 Stat. 1460.

2. Section 76.905 is amended by revising paragraph (c) to read as follows:

§ 76.905 Standards for identification of cable systems subject to effective competition.

* * * * *

(c) For purposes of paragraphs (b)(1) through (b)(3) of this section, each separately billed or billable customer will count as a household subscribing to or being offered video programming services, with the exception of multiple dwelling buildings billed as a single customer. Individual units of multiple dwelling buildings will count as separate households. The term "households" shall not include those dwellings that are used solely for seasonal, occasional, or recreational use.

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3. Section 76.914(a)(1) is revised to read as follows:

§ 76.914 Revocation of certification.

(a) A franchising authority's certification shall be revoked if:

(1) After the franchising authority has been given a reasonable opportunity to comment and cure any minor nonconformance, it is determined that state and local laws and regulations are in substantial and material conflict with the Commission's regulations governing cable rates.

* * * * *

4. Section 76.917 is added to Subpart N to read as follows:

§ 76.917 Notification of certification withdrawal.

A franchising authority that has been certified to regulate rates may, at any time, notify the Commission that it no longer intends to regulate basic cable rates. Such notification shall

include the franchising authority's determination that rate regulation no longer serves the interests of cable subscribers served by the cable system within the franchising authority's jurisdiction, and that it has received no consideration for its withdrawal of certification. Such notification shall be served on the cable operator. The Commission retains the right to review such determinations and to request the factual finding of the franchising authority underlying its decision to withdraw certification. The franchising authority's withdrawal becomes effective upon notification to the Commission.

5. Section 76.922(b) is amended by adding paragraph (b)(9) to read as follows:

§ 76.922 Rates for the basic service tier and cable programming services tiers.

* * * * *

(b) * * *

(9) Updating Data Calculations.
(i) For purposes of this section, if:

(A) A cable operator, prior to becoming subject to regulation, revised its rates to comply with the Commission's rules; and

(B) The data on which the cable operator relied was current and accurate at the time of revision, and the rate is accurate and justified by the prior data; and

(C) Through no fault of the cable operator, the rates that resulted from using such data differ from the rates that would result from using data current and accurate at the time the cable operator's system becomes subject to regulation;

then the cable operator is not required to change its rates to reflect the data current at the time it becomes subject to regulation.

(ii) Notwithstanding the above, any subsequent changes in a cable operator's rates must be made from rate levels derived from data [that was current as of the date of the rate change].

(iii) For purposes of this subsection, if the rates charged by a cable operator are not justified by an analysis based on the data available at the time it initially adjusted its rates, the cable operator must adjust its rates in accordance with the most accurate data available at the time of the analysis.

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6. Section 76.923 is amended by adding paragraph (m) to read as follows:

§ 76.923 Rates for equipment and installation used to receive the basic service tier.

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(m) Cable operators shall maintain adequate documentation to demonstrate that charges for the sale and lease of equipment and for installations have been developed in accordance with the rules set forth in this section.

7. Section 76.930 is revised to read as follows:

§ 76.930 Initiation of review of basic cable service and equipment rates.

A cable operator shall file its schedule of rates for the basic service tier and associated equipment with a franchising authority within 30 days of receiving written notification from the franchising authority that the franchising authority has been certified by the Commission to regulate rates for the basic service tier. Basic service and equipment rate schedule filings for existing rates or proposed rate increases (including increases in the baseline channel change that results from reductions in the number of channels in a tier) must use the appropriate official FCC form, a copy thereof, or a copy generated by FCC software. Failure to file on the official FCC form, a copy thereof, or a copy generated by FCC software, may result in the imposition of sanctions specified in § 76.937(d). A cable operator shall include rate cards and channel line-ups with its filing and include an explanation of any discrepancy in the figures provided in these documents and its rate filing.

8. Section 76.933 is amended to add paragraph (d) to read as follows:

§ 76.933 Franchising authority review of basic cable rates and equipment costs.

* * * * *

(d) A franchising authority may request, pursuant to a petition for special relief under § 76.7, that the Commission examine a cable operator's cost-of-service showing, submitted to the franchising authority as justification of basic tier rates, within 30 days of receipt of a cost-of-service showing. In its petition, the franchising authority shall document its reasons for seeking Commission assistance. The franchising authority shall issue an order stating that it is seeking Commission assistance and serve a copy before the 30-day deadline on the cable operator submitting the cost showing. The cable operator shall deliver a copy of the cost showing, together with all relevant attachments, to the Commission within 15 days of receipt of the local authority's notice to seek Commission assistance. The Commission shall notify the local franchising authority and the cable operator of its ruling and of the basic tier rate, as established by the Commission. The rate shall take effect upon implementation by the franchising authority of such ruling and refund liability shall be governed thereon. The Commission's ruling shall be binding on the franchising authority and the cable operator. A cable operator or franchising authority may seek reconsideration of the ruling pursuant to § 1.106(a)(1) of this chapter or

review by the Commission pursuant to § 1.115(a) of this chapter.

9. Section 76.937 is amended to by adding paragraphs (d) and (e) to read as follows:

§ 76.937 Burden of proof

* * * * *

(d) A franchising authority or the Commission may find a cable operator that does not attempt to demonstrate the reasonableness of its rates in default and, using the best information available, enter an order finding the cable operator's rates unreasonable and mandating appropriate relief, as specified in §§ 76.940, 76.941, and 76.942.

(e) A franchising authority or the Commission may order a cable operator that has filed a facially incomplete form to file supplemental information, and the franchising authority's deadline to rule on the reasonableness of the proposed rates will be tolled pending the receipt of such information. A franchising authority may set reasonable deadlines for the filing of such information, and may find the cable operator in default and mandate appropriate relief, pursuant to paragraph (d) of this section, for the cable operator's failure to comply with the deadline or otherwise provide complete information in good faith.

10. Section 76.938 is revised to read as follows:

§ 76.938 Proprietary information.

A franchising authority may require the production of proprietary information to make a rate determination in those cases where cable operators have submitted initial rates, or have proposed rate increases, pursuant to an FCC Form 393 (and/or FCC Forms 1200/1205) filing or a cost-of-service showing. The franchising authority shall state a justification for each item of information requested and, where related to an FCC Form 393 (and/or FCC Forms 1200/1205) filing, indicate the question or section of the form to which the request specifically relates. Upon request to the franchising authority, the parties to a rate proceeding shall have access to such information, subject to the franchising authority's procedures governing non-disclosure by the parties. Public access to such proprietary information shall be governed by applicable state or local law.

11. Section 76.939 is added to Subpart N to read as follows:

§ 76.939 Truthful written statements and responses to requests of franchising authority.

Cable operators shall comply with franchising authorities' and the Commission's requests for information, orders, and decisions. No cable operator shall, in any information submitted to a franchising authority or the Commission in making a rate determination pursuant to an FCC

Form 393 (and/or FCC Forms 1200/1205) filing or a cost-of-service showing, make any misrepresentation or willful material omission bearing on any matter within the franchising authority's or the Commission's jurisdiction.

12. Section 76.942 is amended by revising paragraphs (a), (c)(2), and adding (c)(3) and (f) to read as follows:

§ 76.942 Refunds.

(a) A franchising authority (or the Commission, pursuant to § 76.945) may order a cable operator to refund to subscribers that portion of previously paid rates determined to be in excess of the permitted tier charge or above the actual cost of equipment, unless the operator has submitted a cost-of-service showing which justifies the rate charged as reasonable. An operator's liability for refunds shall be based on the difference between the old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s). Where an operator was charging separately for program services and equipment but the rates were not in compliance with the Commission's rules, the operator's refund liability shall be based on the difference between the sum of the old charges and the sum of the new, unbundled program service and equipment charges. Before ordering a cable operator to refund previously paid rates to subscribers, a franchising authority (or the Commission) must give the operator notice and opportunity to comment.

* * * * *

(c) * * *

(1) * * *

(2) From the date a franchising authority issues an accounting order pursuant to § 76.933(c), to the date a prospective rate reduction is issued, then back in time from the date of the accounting order to the effective date of the rules; however, the total refund period shall not exceed one year from the date of the accounting order.

(3) Refund liability shall be calculated on the reasonableness of the rates as determined by the rules in effect during the period under review by the franchising authority or the Commission.

* * * * *

(f) At the time a franchising authority (or the Commission, pursuant to paragraph (a) of this section) orders a cable operator to pay refunds to subscribers, the franchising authority must return to the cable operator an amount equal to that portion of the franchise fee that was paid on the total amount of the refund to subscribers. The franchising authority must promptly return the franchise fee overcharge either in an immediate lump sum payment, or the cable operator may deduct it from the cable system's future franchise fee payments.

13. Section 76.943 is amended by revising paragraph (b) and adding paragraph (c) to read as follows:

§ 76.943 Fines

* * * * *

(b) If a cable operator willfully fails to comply with the terms of any franchising authority's order, decision, or request for information, as required by § 76.939, the Commission may, in addition to other remedies, impose a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b).

(c) A cable operator shall not be subject to forfeiture because its rate for basic service or equipment is determined to be unreasonable.

14. Section 76.944 is amended by revising paragraph (b) to read as follows:

§ 76.944 Commission review of franchising authority decisions on rates for the basic service tier and associated equipment.

* * * * *

(b) Any participant at the franchising authority level in a ratemaking proceeding may file an appeal of the franchising authority's decision with the Commission within 30 days of release of the text of the franchising authority's decision as computed under § 1.4(b) of this chapter. Appeals shall be served on the franchising authority or other authority that issued the rate decision. Where the state is the appropriate decisionmaking authority, the state shall forward a copy of the appeal to the appropriate local official(s). Oppositions may be filed within 15 days after the appeals is filed, and must be served on the party(ies) appealing the rate decision. Replies may be filed 7 days after the last day for oppositions and shall be served on the parties to the proceeding.

15. Section 76.945(b) is revised to read as follows:

§ 76.945 Procedures for Commission review of basic service rates.

* * * * *

(b) Basic service and equipment rate schedule filings for existing rates or proposed rate increases (including increases in the baseline channel change that results from reductions in the number of channels in a tier) must use the official FCC form, a copy thereof, or a copy generated by FCC software. Failure to file on the official FCC form or a copy may result in the imposition of sanctions specified in § 76.937(d). Cable operators seeking to justify the reasonableness of existing or proposed rates above the permitted tier rate must submit a cost-of-service showing

sufficient to support a finding that the rates are reasonable.

* * * * *

16. Section 76.946 is added to Subpart N to read as follows:

§ 76.946 Advertising of rates.

Cable operators that advertise rates for basic service and cable programming service tiers shall be required to advertise rates that include all costs and fees. Cable systems that cover multiple franchise areas having differing franchise fees or other franchise costs, different channel line-ups, or different rate structures may advertise a complete range of fees without specific identification of the rate for each individual area. In such circumstances, the operator may advertise a "fee plus" rate that indicates the core rate plus the range of possible additions, depending on the particular location of the subscriber.

17. Section 76.953(b) is revised to read as follows:

§ 76.953 Limitation on filing a complaint.

* * * * *

(b) Complaint regarding a rate change. Except as provided in paragraph (a) of this section, a complaint alleging an unreasonable rate for cable programming service or associated equipment may be filed against a cable operator only in the event of a rate change, including an increase or decrease in rates, or a change in rates that results from a change in a system's service tiers. A rate change may involve an implicit rate increase (such as deleting channels from a tier without a corresponding lowering of the rate for that tier). A complaint regarding a rate change for cable programming service or associated equipment may be filed against a cable operator only in the event of a rate change. A complaint regarding a rate change for cable programming service or associated equipment must be filed with the Commission within 45 days from the date the complainant receives a bill from the cable operator that reflects the rate change.

* * * * *

18. Section 76.956(a) is revised to read as follows:

§ 76.956 Cable operator response.

(a) Unless the Commission notifies a cable operator to the contrary, the cable operator must file with the Commission a response to the complaint filed on the applicable form, within 30 days of the date of service of the complaint. The response shall indicate when service occurred. Service by mail is complete upon mailing. See § 1.47(f) of this chapter. The response shall include the information required by the appropriate FCC form, including rate cards, channel line-ups, and an

explanation of any discrepancy in the figures provided in these documents and the rate filing. The cable operator must serve its response on the complainant (and, if the complainant is a subscriber, the relevant franchising authority) via first class mail.

* * * * *

19. Section 76.961 is amended by revising paragraph (b) and adding paragraph (e) to read as follows:

§ 76.961 Refunds

* * * * *

(b) The cumulative refund due subscribers shall be calculated from the date a valid complaint is filed until the date a cable operator implements a prospective rate reduction as ordered by the Commission pursuant to § 76.960. The Commission shall calculate refund liability according to the rules in effect for determining the reasonableness of the rates for the period of time covered by the complaint.

* * * * *

(e) At the time the Commission orders a cable operator to pay refunds to subscribers, the franchising authority must return to the cable operator an amount equal to that portion of the franchise fee that was paid on the total amount of the refund to subscribers. The franchising authority may return the franchise fee overcharge either in an immediate lump sum payment, or the cable operator may deduct it from the cable system's future franchise fee payments.

20. Section 76.984 is revised to read as follows:

§ 76.984 Geographically uniform rate structure.

(a) The rates charged by cable operators for basic service, cable programming service, and associated equipment and installation shall be provided pursuant to a rate structure that is uniform throughout each franchise area in which cable service is provided.

(b) This section does not prohibit the establishment by cable operators of reasonable categories of service and customers with separate rates and terms and conditions of service, within a franchise area. Cable operators may offer different rates to multiple dwelling units of different sizes and may set rates based on the duration of the contract, provided that the operator can demonstrate that its cost savings vary with the size of the building and the duration of the contract, and as long as the same rate is offered to buildings of the same size with contracts of similar duration.

(c) Contracts between cable operators and multiple dwelling units entered into on or before April 1, 1993 may remain in effect until their previously agreed-upon expiration date.

APPENDIX B

MM Docket No. 92-266

Petitions for Reconsideration of Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266, 8 FCC Rcd 5631 (1993)

Affiliated Regional Communications, Ltd.
Alaska Cablevision, Inc.
Alsea River Cable TV
Arizona Cable Television Association, et al.
Atlanta Interfaith Broadcasters, Inc.
Bank of New York
Baraff, Koerner, Olender & Hochberg, P.C.
Bell Atlantic
Black Entertainment Television, Inc.
Blade Communications, Inc.
Booth American Company, et al.
C-SPAN
Cable Services
Cablevision Systems Corporation
California Cable Television Association
Center for Media Education, et al.
Century Communications Corp.
Coalition of Small System Operators
Colony Communications, Inc., et al.
Comcast Cable Communications, Inc.
Community Antenna Television Association, Inc.
Community Broadcasters Association
Continental Cablevision, Inc.
Corning Incorporated; Scientific Atlanta, Inc.
Crown Media, Inc.
Discovery Communications, Inc.
The Disney Channel
E! Entertainment Television, Inc.
Encore Media Corporation
Fairmont Cable
Harron Communications Corp.
Higgins Lake Cable, Inc.
Inland Bay Cable TV Associates
InterMedia Partners
King County, Wash., et al.
Liberty Media Corp.
Longview Cable Television

Michigan C-TEC Communities
Mountain Cablevision, Inc.
Multichannel Communication Sciences, Inc.
Municipal Franchising Authorities
National Association of Telecommunications Officers and Advisors, et al.
National Cable Television Association, Inc.
Newhouse Broadcasting Corporation
Northland Communications Corp.
Paradise Television Network, Inc.
Searle, Stanley M.
SuperStar Connection
Sur Corporation
Tele-Communications, Inc.
Time Warner Entertainment Company, L.P.
TKR Cable Company/TKR Cable of Kentucky
Turner Broadcasting System, Inc.
Valuevision International, Inc.
Viacom International, Inc.
Video Data Systems
Video Jukebox Network, Inc.
Wometco Cable Corp.

Comments/Oppositions to Petitions for Reconsideration

Ad Hoc Rural Consortium
Advanced Communications, Inc.
Affiliated Regional Communications, Ltd.
Arizona Cable Television Association
Bell Atlantic
Bellsouth Telecommunications
Bend Cable Communications, Inc., et al.
Cable TV of Jersey City, Inc.
Cablevision Industries Corporation, et al.
Cablevision Systems Corporation
Center for Media Education, et al.
Consumer Electronics Group of the Electronic Industries Association
Consumer Federation of America
C-TEC Cable Systems
Continental Cablevision, Inc.
General Instrument Corporation
GTE Service Corporation
Home Recording Right Coalition
Home Shopping Network, Inc.
King County, et al.
Liberty Cable Company, Inc.
Medium-Sized Operators Group

Michigan Communities
National Association of Telecommunications Officers and Advisors, et al.
National Association of Towns and Townships
National Cable Television Association, Inc.
National Telephone Cooperative Association
Prevue Networks, Inc.
Time Warner Entertainment Company, Inc.
United States Telephone Association
USA Networks
Valuevision International, Inc.
Viacom International, Inc.
Videomaker Magazine

Replies to Oppositions to Petitions for Reconsideration

Cablevision Industries Corp., et al.
Cablevision Systems Corporation
Center for Media Education, et al.
City of Saint Paul
Coalition of Small System Operators
Continental Cablevision, Inc.
Corning Incorporated; Scientific-Atlanta, Inc.
Discovery Communications, Inc.
Engle Broadcasating
King County, Wash., et al.
Liberty Media Corporation
Medium-Sized Operators Group
Michigan C-TEC Corporation
National Association of Telecommunications Officers and Advisors, et al.
National Cable Television Association, Inc.
Paradise Television Network, Inc.
Puerto Rico Cable Television Association
State of Hawaii
Sur Corporation
Televista Communications, Inc.
Time Warner Entertainment Company, L.P.
United Video, Inc.
Valuevision International, Inc.
Viacom International, Inc.

Petitions for Reconsideration of First Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking in MM Docket No. 92-266, FCC 93-428, released August 27, 1993.

New York Telephone Company and New England Telephone and Telegraph Company

("NYNEX")
Attorney General of the State of Connecticut (Statement in support of NYNEX)

Oppositions to Petitions for Reconsideration

Cablevision Industries Corporation, et al.
Continental Cablevision, Inc.
Time Warner Entertainment Company, L.P.
Viacom International, Inc.

Reply to Oppositions to Petitions for Reconsideration

NYNEX

MM Docket No. 92-262

Petition for Reconsideration of Report and Order in MM Docket No. 92-262, 8 FCC Rcd 2274 (1993)

Prime Cable

February 22, 1994

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Buy-Through Prohibition Third Order on Reconsideration MM Docket Nos. 92-266 and 92-262, respectively

In this action, the Commission has resolved numerous issues on reconsideration regarding the implementation of its cable rate regulations. I write separately to address the issue of evasion. It is imperative that the patterns of conduct cited in this Order (*e.g.*, the collapsing of multiple tiers of service into the basic tier) not be viewed as *per se* evasions of the Commission's rules. Rather these actions will be viewed on a case-by-case basis subject to a showing which can rebut any presumption of evasion. Without more specific information, I believe the Commission should not make a final determination about cable operator conduct in this regard.

*U.S. Government Printing Office: 1994 — 300-842/00025